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TEXAS CIVIL PROCEDURE

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THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions.

I. JURISDICTION OF THE SUBJECT MATTER

*Carlisle v. Bennett*¹ addressed the power of a district court to adjudicate a claim by a beneficiary of an estate alleging that the executrix had conspired to sell an asset of the estate at less than its true value. While section 5(e) of the Texas Probate Code² authorizes courts exercising original probate jurisdiction to hear all matters "incident to an estate," this language has been held to be limited to those disputes in which the controlling issue concerns matters relating to the settlement, partition, or distribution of an estate.³ Finding that the controlling issue in the beneficiary's claim was the sale of the estate's asset by the executrix in breach of her fiduciary duties, and therefore a matter relating to the distribution of the estate⁴, the court in *Carlisle* held that under section 5(e) the probate court had exclusive jurisdiction over the claim and affirmed the district court's dismissal of it.⁵ It should be noted that this decision adds to the conflict between other courts of appeal on the question of whether the probate court has exclusive jurisdiction over matters incident to an estate;⁶ and, as a result, the question would appear to be ripe for resolution by the supreme court.

The court in *Picon Transportation, Inc. v. Pomeranz*⁷ was confronted with

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1. 801 S.W.2d 589 (Tex. App.—Corpus Christi 1990, no writ).

2. TEX. PROB. CODE ANN. § 5(e) (Vernon 1980 & Supp. 1992).

3. See *Seay v. Hall*, 677 S.W.2d 19, 23 (Tex. 1984). See generally Ernest E. Figari, Jr., Thomas H. Graves & A. Erin Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 40 Sw. L.J. 491, 491-92 (1986) [hereinafter cited as *1986 Annual Survey*].

4. 801 S.W.2d at 591.

5. *Id.*

6. Compare *Thomas v. Toolon*, 609 S.W.2d 859, 861 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (finding exclusive jurisdiction in probate court), with *Goodwin v. Kent*, 745 S.W.2d 466, 469 n.5 (Tex. App.—Tyler 1988, writ denied) (rejecting exclusive jurisdiction in probate court).

7. 814 S.W.2d 489 (Tex. App.—Dallas 1991, writ denied) (2-1 decision).

an unexpected jury verdict which had jurisdictional implications. The plaintiff asserted a claim for personal injury seeking to recover damages of "not less than" \$49,860⁸ in a county court whose jurisdictional limit was \$50,000.⁹ Nevertheless, after a jury awarded total damages of \$125,000, the significant portion of which had accrued prior to suit, the county court entered a judgment for the full amount and an appeal ensued.¹⁰ Disagreeing with the action of the county court, the appellate court reduced the judgment to \$50,000, concluding that the trial court had no power in this instance to award damages above its jurisdictional limit.¹¹

II. JURISDICTION OVER THE PERSON

Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.,¹² a recent decision of the Supreme Court of Texas, is the most significant decision during the survey period in the area of personal jurisdiction.¹³ *Guardian Royal* is noteworthy because it is the first authoritative decision in Texas to address the assertion of personal jurisdiction over an alien insurance company under the "territory-of-coverage" approach.¹⁴ The nonresident defendant, an English insurer with no ties to the United States, issued an insurance policy to an English company. The policy provided liability coverage to the policy holder and its subsidiaries, one of whom was noted in an endorsement to the policy as being located in the U.S.A. This subsidiary, a Texas corporation, subsequently settled a liability claim brought against it arising out of an accident that occurred in Texas. A dispute thereafter arose over the alien insurer's duty to reimburse the Texas subsidiary under the policy that had been issued to its English parent; and the subsidiary sued the insurer in Texas for breach of contract and effected service under the Texas long-arm statute. The insurer objected to personal jurisdiction and, after the trial court sustained the challenge, an appeal followed. Conceding that the insurance agreement was between two English companies, was negotiated and implemented in England, and did not reference Texas, the court of appeals nevertheless reversed and held the alien insurer subject to suit in Texas.¹⁵ The court of appeals reasoned that since the insurer had agreed to

8. 814 S.W.2d at 490.

9. TEX. GOV'T CODE ANN. § 25.0452(a)(2) (Vernon 1988).

10. 814 S.W.2d at 490.

11. *Id.*

12. 815 S.W.2d 223 (Tex. 1991).

13. See generally Ernest E. Figari, A. Erin Dwyer & Donald Colleluori, *Texas Civil Procedure, Annual Survey of Texas Law*, 44 Sw. L.J. 541, 544-45 (1990) [hereinafter cited as *1990 Annual Survey*].

14. "In exercising jurisdiction [over alien insurance companies], the courts infer the necessary contact from policy language defining the territory of coverage. In short, if the geographical scope of the coverage includes the forum state, then the court, having jurisdiction over the insured, may exercise jurisdiction over the insurer as well." William C. Hoffman, *Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule*, 26 TORT & INSUR. L. J. 703 (1991).

15. *Southern Clay Prod., Inc. v. Guardian Royal Exch. Assurance, Ltd.*, 762 S.W.2d 927, 932-33 (Tex. App.—Corpus Christi 1988), *rev'd*, 815 S.W.2d 223 (Tex. 1991); see *1990 Annual Survey* at 544-45.

cover risks anywhere in the world, this was sufficient notice of potentially insured activities throughout the United States, including Texas.¹⁶ Thus, according to the court of appeals, the acceptance of this broad risk indicated the alien insurer's willingness to be haled into court in any state where a United States subsidiary was involved with a covered accident.¹⁷

Undaunted, the insurer sought review of the matter by the Supreme Court of Texas. Observing that the federal due process inquiry was divided into two parts, the court reiterated (1) that the nonresident defendant must have purposefully established "minimum contacts" with the forum state; and (2) that the exercise of jurisdiction over the nonresident defendant must comport with "fair play and substantial justice."¹⁸ Although the policy was a liability policy for a risk with a fixed locale (*i.e.*, the United States), the insurer was unaware of the subsidiary's specific location within the United States. Nevertheless, observing that an endorsement to the policy provided it would be treated as if a separate insurance policy had been issued to each subsidiary, the supreme court concluded that the insurer could reasonably anticipate that a coverage dispute with a subsidiary would arise concerning litigation in any state of the United States.¹⁹ On this basis the court concluded that the alien insurer had purposefully established the necessary contacts with Texas.²⁰

Turning its attention to whether the assertion of jurisdiction over the insurer was fair, the supreme court emphasized that the suit did not involve a Texas resident and, as a result, Texas had only a minimal interest in adjudicating the dispute.²¹ Since requiring submission of a dispute between an English insurer and its English insured to the United State's judicial system would be burdensome, the court found that such assertion was unreasonable and, for this reason, held personal jurisdiction over the alien insurer lacking.²²

A case decided shortly thereafter, *El Paso Reyco, Inc. v. Malaysia British Assurance*²³, also followed the "territory-of-coverage" approach in addressing a jurisdictional dispute involving an alien reinsurer. The alien reinsurer, a Malaysia company having no connection with Texas, reinsured a nonresident primary insurer which, in turn, provided insurance coverage to a Texas corporation. After the individual plaintiff, a Texas resident, recovered a judgment against the insured Texas corporation, the two joined together in a suit against the primary insurer on the primary coverage. By the time they obtained a judgment, however, the primary insurer was insolvent. Thereafter, the Texas plaintiffs focused on the Malaysian reinsurer for satisfaction of

16. 762 S.W.2d at 932.

17. *Id.*

18. 815 S.W.2d at 226 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). See also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984).

19. 815 S.W.2d at 231-32.

20. *Id.* at 232.

21. *Id.*

22. *Id.* at 232-33.

23. 808 S.W.2d 529 (Tex. App.—El Paso, Apr. 3, 1991, writ requested).

their recovery. They sued the reinsurer in Texas on its reinsurance agreement and effected service under the long-arm statute. The alien reinsurer objected to personal jurisdiction, the trial court sustained the challenge, and the plaintiffs thereafter commenced an appeal.

As framed by the court of appeals, the question was whether a Texas court may exercise jurisdiction over an alien reinsurer whose only contact with Texas was entering into a reinsurance agreement with a now insolvent nonresident primary insurer, who had insured a Texas corporation against whom there is an outstanding final judgment remaining unpaid.²⁴ Noting that the alien reinsurer's memorandum of insurance with the primary insurer specified that such insurer would be writing casualty insurance within the United States, the court of appeals adhered to the "territory-of-coverage" approach and concluded the reinsurer had the necessary relationship with the forum state to sustain jurisdiction over its person.²⁵ As regards the fairness of requiring the alien reinsurer to defend in Texas, the court concluded that Texas had a manifest interest in providing a forum for the Texas plaintiffs to adjudicate their disputes, reasoning that if the plaintiffs had to follow the reinsurer to a distant country to secure redress, they would be severely disadvantaged.²⁶ Accordingly, the court of appeals reversed the trial court and held that Texas courts were obliged to assume jurisdiction.²⁷

A relatively obscure provision²⁸ of the Texas long-arm statute also received attention during the Survey period. A provision of that statute stipulates that when process is delivered to the Secretary of State for forwarding to a nonresident defendant, the Secretary of State "shall require a statement of the name and address of the nonresident's home or home office" to facilitate such forwarding.²⁹ *Security Pacific Corp. v. Lupo*³⁰ recently considered this address requirement as it related to a corporate defendant. The record before the court revealed that the Secretary of State received only the defendant's "address in California" and that he forwarded process to that location. The plaintiff obtained a default judgment based on this service, and the defendant sought to set it aside, arguing noncompliance with the statutory provision. Observing that nothing in the record showed that the California address furnished the Secretary of State was the home office address required by the statute, the court concluded the statute had not been satisfied and set aside the judgment.³¹

24. *Id.* at 529.

25. *Id.* at 530-31.

26. *Id.* at 531.

27. *Id.*

28. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (Vernon Supp. 1991).

29. *Id.*

30. 808 S.W.2d 126 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

31. *Id.* at 127; see *Bank of America v. Love*, 770 S.W.2d 890, 891-92 (Tex. App.—San Antonio 1989, writ denied) (default judgment void due to lack of strict compliance with statutory requirements); *Carjan Corp. v. Sonner*, 765 S.W.2d 553, 555 (Tex. App.—San Antonio 1989, no writ) (service ineffective in absence of forwarding to defendant's home office); *Verges v. Lomas Nettleton Fin. Corp.*, 642 S.W.2d 820, 823 (Tex. App.—Dallas 1982, no writ) (strict compliance with address requirement statute); *Southern Distrib. Co. v. Technical Support As-*

III. SPECIAL APPEARANCE

Texas Rule of Civil Procedure 120a governs special appearances to challenge personal jurisdiction in state court. Rule 120a requires a party making a special appearance to have the appearance heard prior to any other plea or motion.³² A dilemma arises when counsel is asked to represent a nonresident defendant against whom a default judgment has been taken and the defendant is not subject to the personal jurisdiction of the forum. The court may rule that counsel's action amounts to a general appearance if counsel files a special appearance followed by a motion for new trial.³³ The defendant is then obliged to defend the suit in Texas if the motion for new trial is acted upon and the default judgment set aside.³⁴ One decision during the Survey period appears to have provided a solution to this dilemma.³⁵

In *Koch Graphics, Inc. v. Avantech, Inc.*³⁶ the trial court entered a partial default judgment because the time within which the defendant had to file an answer expired after nonresident service was effected. Approximately one month later, while the partial default was still interlocutory, the defendant filed a special appearance. Subject to the special appearance, the defendant also filed a motion to quash service, a motion for new trial, and an answer. Shortly thereafter, the plaintiff filed an amended answer deleting the claims not previously adjudicated by default, thereby making the default judgment final. Subsequently, the trial court held a hearing on the special appearance, but overruled it on the basis it did not have the power to entertain the matter after the default judgment had been entered. The trial court then denied the motions to quash service and for new trial; and the defendant prosecuted an appeal.

The appellate court ruled that the trial court had the power to address the special appearance after the entry of a default judgment and, indeed, could do so until it lost its plenary power over the judgment.³⁷ Further, rejecting the plaintiff's contention that the special appearance had been waived when the defendant submitted its motion for new trial and other filings, the court emphasized that those filings were expressly made subject to the special appearance and therefore did not result in a waiver.³⁸ The court, in turn, considered the special appearance on its merits and held the trial court lacked personal jurisdiction over the defendant.³⁹

The standard of review applicable on appeal to a ruling on a special ap-

soc., Inc., 105 F.R.D. 1, 2 (S.D. Tex. 1984) (designated agent's address insufficient to satisfy compliance requirement).

32. TEX. R. CIV. P. 120a(1).

33. See *Liberty Enter., Inc. v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985).

34. *Id.*

35. *Koch Graphics, Inc. v. Avantech, Inc.*, 803 S.W.2d 432 (Tex. App.—Dallas 1991, no writ).

36. *Id.*

37. *Id.* at 433.

38. *Id.* Cf. *Liberty Enter. v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985) (filing of unconditional motion for new trial waives previously filed special appearance).

39. 803 S.W.2d at 433-35.

pearance was considered in *Bellair, Inc. v. Aviall of Texas, Inc.*⁴⁰ and *NCNB Texas National Bank v. Anderson*⁴¹. *Bellair* arose out of an appeal from the denial of a special appearance. Comparing a challenge to personal jurisdiction through a special appearance to a challenge to venue, the court applied the statutory standard of review applicable to the appeal of venue rulings⁴² and, after doing so, relied upon the entire record in the trial court in sustaining the trial court's denial of the special appearance.⁴³ However, the decision offers almost no basis for applying a statutorily-created standard of review,⁴⁴ expressly restricted to venue rulings⁴⁵, to the review of a denial of a special appearance.

In *Anderson*, on the other hand, the appellant urged that a summary judgment standard of review should be applied in reviewing an order sustaining a defendant's special appearance, presumably to enable him to argue that the evidence adduced at the special appearance hearing did not establish as a matter of law that there was no genuine issue of material fact.⁴⁶ Finding little similarity between the two sets of procedures, the court held there was no valid reason for applying a summary judgment standard of review to appeals from a special appearance.⁴⁷

Finally, two cases recently considered the type of conduct that will result in a waiver of a special appearance. The court in *Slater v. Metro Nissan of Montclair*,⁴⁸ relying on the requirement in rule 120a that a special appear-

40. 819 S.W.2d 845 (Tex. App.—Dallas, Sept. 30, 1991, writ requested) (2-1 decision).

41. 812 S.W.2d 441 (Tex. App.—San Antonio 1991, no writ).

42. 819 S.W.2d at 898. The ruling on a venue hearing is not immediately appealable, and the appellate court will consider the entire record, including evidence presented at the trial on the merits. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064 (Vernon 1986).

43. 819 S.W.2d at 898. Specifically, the appellate court relied on answers to requests for admissions submitted after the special appearance hearing in support of a motion for summary judgment. *Id.* See *Franklin v. Geotechnical Services, Inc.*, 819 S.W.2d 219, 223 (Tex. App.—Fort Worth, Nov. 6, 1991, n.w.h.) (appellate reliance placed on portion of deposition on file, but not read into record at special appearance hearing, in sustaining dismissal for lack of personal jurisdiction).

44. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) ("In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits.") TEX. R. CIV. P. 120a, which governs special appearance practice in Texas, contains no similar provision. To the contrary, as noted by the dissent in *Bellair*, "the rule governing special appearances strongly suggests that discovery practices traditionally associated with a trial on the merits, such as the serving of requests for admissions, shall have no adverse effect on a party's right to object to trial court jurisdiction" and, for that reason, would "limit . . . [appellate] review to the record before the trial court when it denied . . . [the] special appearance." *Bellair*, 819 S.W.2d at 900. (Rowe, J., dissenting).

45. See, e.g., *Tex. City Ref., Inc. v. Conoco, Inc.*, 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Lewis v. Exxon Co.*, 786 S.W.2d 724, 728 (Tex. App.—El Paso 1989, writ denied). See generally W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 870-71 (1990).

46. See *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970) (on an appeal from a summary judgment the question is "whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action") (emphasis added); see generally W. Wendell Hall, *Standards of Appellate Review in Civil Cases*, 21 ST. MARY'S L.J. 865, 881-83 (1990).

47. 812 S.W.2d at 443.

48. 801 S.W.2d 253 (Tex. App.—Fort Worth 1990, writ denied).

ance "shall be made by sworn motion",⁴⁹ held that a special appearance (1) must be direct and unequivocal and (2) must be based on the personal knowledge of the affiant.⁵⁰ It is noteworthy that no special exception was leveled at the special appearance in the trial court. Nevertheless, under its view of the verification requirement of rule 120a, the appellate court concluded that, with respect to the defendant's special appearance, it was neither direct and unequivocal nor based on the personal knowledge of the affiant.⁵¹ Accordingly, the court ruled that the defendant had waived its special appearance and, by filing the deficient special appearance, had submitted its person to the jurisdiction of the court.⁵²

In *In the Interest of S.A.V. and K.E.V.*⁵³ the defendant made a plea to the subject matter jurisdiction of the trial court and also challenged personal jurisdiction through the filing of a special appearance. Noting that the defendant had first attacked subject matter jurisdiction and had made no attempt to assert such objection in the alternative to his special appearance, the court found that the defendant's order of attack had waived his special appearance and he had thereby generally appeared before the trial court.⁵⁴

IV. SERVICE OF PROCESS

Texas Rule of Civil Procedure 107 provides that "[n]o default judgment shall be granted in any cause until the citation . . . shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment."⁵⁵ *HB & WM, Inc. v. Smith*⁵⁶ considered the validity of a default judgment where the omission of a file date on the citation caused uncertainty as to fulfillment of the ten day requirement. The court in *Smith*, joining with earlier cases,⁵⁷ set aside the default judgment because, in the absence of a file mark on the citation showing when it had been filed, the record did not affirmatively show compliance with rule 107.⁵⁸

*Martinez v. Wilber*⁵⁹ is a warning that the file number on a citation should also be checked for errors before service with it is effected. Texas Rule of

49. TEX. R. CIV. P. 120a. See also *Villalpando v. De La Garza*, 793 S.W.2d 274, 276 (Tex. App.—Corpus Christi 1990, no writ) (ruling that an unsworn special appearance constituted a general appearance).

50. 801 S.W.2d at 254.

51. *Id.* at 255.

52. *Id.*

53. 798 S.W.2d 293 (Tex. App.—Amarillo 1990, writ granted).

54. *Id.* at 300; see also *Portland Savings & Loan Ass'n v. Bernstein*, 693 S.W.2d 478, 480 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (filings which were not made subject to the special appearance resulted in waiver of the special appearance), *vacated* 716 S.W.2d 532 (Tex. App.—Corpus Christi, 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986).

55. TEX. R. CIV. P. 107.

56. 802 S.W.2d 279 (Tex. App.—San Antonio 1990, no writ).

57. See *Gerdes v. Marion State Bank*, 774 S.W.2d 63, 65 (Tex. App.—San Antonio 1989, writ denied); *Gentry v. Gentry*, 550 S.W.2d 167, 167-168 (Tex. Civ. App.—Austin 1977, no writ); *First Nat'l Bank of Fabens v. Pacific Cotton Agency*, 329 S.W.2d 504, 505-06 (Tex. Civ. App.—San Antonio 1959, no writ), *Citizens Nat'l Bank in Ennis v. Hart*, 321 S.W.2d 319, 320 (Tex. Civ. App.—Fort Worth 1959, writ ref'd).

58. 802 S.W.2d at 282.

59. 810 S.W.2d 461 (Tex. App.—San Antonio 1991, writ denied) (2-1 decision).

Civil Procedure 99(b) mandates that a citation shall show, among other things, the "file number" of the cause out of which it is issued.⁶⁰ In *Martinez* the plaintiff filed suit against two defendants but subsequently amended his petition to name three additional defendants. Before citation was issued for the newly-added defendants, however, the trial court severed the claims against them from the original suit and they were docketed under a new file number. Nevertheless, when citations were issued for the three defendants, the original file number was utilized and, as a result, service was effected under that number. Thereafter, on the basis of such citation, a default judgment was entered against one defendant in the severed case when that defendant failed to appear or answer. After the default judgment became final the defendant attacked it by writ of error. Noting that the citation bore the incorrect file number and therefore violated rule 99(b), the court found that the defect was fatal and set aside the default judgment.⁶¹

V. PLEADINGS

Rule 13 of the Texas Rules of Civil Procedure,⁶² aimed at deterring the filing of frivolous pleadings,⁶³ was the subject of judicial attention during the Survey period. Rule 13 has always provided that the signatures of attorneys or parties on a court filing certify that they have read it and that the filing "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment."⁶⁴ The rule defines groundless as "no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law."⁶⁵ Sanctions shall be imposed by the court, upon motion or its own initiative, upon either or both the person who signed a filing in violation of the rule and the represented party.⁶⁶ In a case of first

60. TEX. R. CIV. P. 99(b).

61. 810 S.W.2d at 463; see also *Gutierrez v. Cuellar*, 236 S.W.2d 497, 499 (Tex. Civ. App.—San Antonio 1922, no writ) (lack of file number in citation is fatal defect); *Duke v. Spiller*, 111 S.W. 787 (Tex. Civ. App. 1908, no writ) (default judgment set aside where citation failed to state file number).

62. TEX. R. CIV. P. 13.

63. See generally Anthony Benedetto & David Keltner, *Changes in Pleading Practices (Including the Frivolous Suit Question)*, 1987 ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988-RULES AND STATUTORY CHANGES F-2 to F-12 (discussing legislative history, purpose, and effect of rule 13); Elaine A. Carlson, *Procedural Changes Mandated by the 1988 Rule Changes*, 6 ADVOC. 22, 23 (1987) (discussing frivolous suit deterrence purpose of rule 13).

64. TEX. R. CIV. P. 13; see also FED. R. CIV. P. 11 (analogous federal rule governing signing of pleadings). See generally 5 Charles Alan Wright & Arthur R. Miller, *FED. PRAC. & PROC.* §§ 1331-35 (2d ed. 1990) (discussing federal analogous to TEX. R. CIV. P. 13).

65. TEX. R. CIV. P. 13. Rule 13 may lead to a resurgence in special exception practice in Texas. Traditionally, a special exception may be used, among other things, to force the pleader to allege all essential elements of his cause of action. See, e.g., *Covington v. Associated Employers Lloyds*, 195 S.W.2d 209, 211 (Tex. Civ. App.—Eastland 1946, writ ref'd). Interacting with special exception practice, rule 13 prohibits a pleader from making a statement in his pleading known to be groundless and false and authorizes the imposition of sanctions if a violation occurs. Thus, if an essential allegation known to be without evidentiary support is omitted from a pleading, the pleader might avoid the threat of rule 13. As a result, special exception practice may be utilized to compel the full pleading of a cause of action so as to subject previously omitted allegations to the scrutiny of rule 13.

66. TEX. R. CIV. P. 13. It should be noted that one case during a prior survey period

impression in Texas the court in *Home Owners Funding Corp. v. Schepppler*⁶⁷, following the lead of pertinent federal authority,⁶⁸ held that appellate review of an order granting or denying relief under rule 13 should be by way of an "abuse of discretion" standard and not through a *de novo* review.⁶⁹

Two decisions of the supreme court concerned the proper assertion of affirmative defenses in pleadings. In *Roark v. Stallworth Oil & Gas, Inc.*⁷⁰ the supreme court had to decide whether an affirmative defense (e.g., lack of consideration), that had not been alleged in an answer as required by rule 94,⁷¹ could nevertheless provide a basis for summary judgment when the defense was raised in the summary judgment motion and the non-movant had failed to object to the defect before the rendition of such judgment. Likening a summary judgment hearing to a trial, the court concluded that under the circumstances the omitted defense had been tried by implied consent and, since the non-movant should have raised the matter in the trial court but failed to do so, the deficiency had been waived.⁷² Accordingly, the court held that the defense omitted from the pleading, but supported by summary judgment motion and proof, was a proper basis for the trial court's judgment.⁷³ *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*,⁷⁴ the second decision of the supreme court in this area, held that the affirmative defense of payment, when asserted in response to a suit on a sworn account, did not have to be verified in order for evidence supporting the defense to be admitted at trial.⁷⁵

clarified that former rule 13 does not apply to a nonparty. See Texas Att'y General's Office of America v. Adams, 793 S.W.2d 771, 775 (Tex. App.—Fort Worth 1990, no writ). Under rule 13, the trial court may impose sanctions against the offending party which include disallowance of further discovery, assessment of discovery expenses or taxable costs, establishment of designated facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, dismissal of claims, rendition of a default judgment, and contempt. See TEX. R. CIV. P. 215(2)(b) (miscellaneous sanctions); TEX. R. CIV. P. 215(2)(b)(6) (contempt).

67. 815 S.W.2d 884 (Tex. App.—Corpus Christi, Sept. 5, 1991, n.w.h.).

68. See *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990).

69. 815 S.W.2d at 888-89. It should be noted that the court in *P.N.L., Inc. v. Owens*, a case also decided during the Survey period, assumed without discussion that the "abuse of discretion" standard was applicable in appellate review of a ruling under rule 13. *P.N.L., Inc. v. Owens*, 799 S.W.2d 439, 441 (Tex. App.—El Paso 1990, no writ). See generally W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L. J. 805, 934-35 (1990) (discussing "abuse of discretion" standard of appellate review in Texas).

70. 813 S.W.2d 492 (Tex. 1991).

71. TEX. R. CIV. P. 94. The rule provides that:

In a pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. (emphasis added).

72. 813 S.W.2d at 495.

73. *Id.* at 495-96.

74. 34 Tex. Sup. Ct. J. 822 (Sept. 18, 1991) (per curiam).

75. *Id.* at 822; see also *Gayne v. Dual-Air, Inc.*, 600 S.W.2d 373, 375 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (failure to file properly sworn affidavit does not preclude assertion of affirmative defense); *Wauson & Williams, Architects, Inc. v. Reeder Dev. Corp.*, 572 S.W.2d 24, 26 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (affirmative defense

Although arising in a pleadings context, the decision of the Dallas court of appeals in *United Marketing Technology, Inc. v. First USA Merchant Services, Inc.*⁷⁶ may have broader implications. A local rule of the trial court provided that "no amendment to a pleading shall be filed less than fourteen (14) days prior to the date a case is set for trial."⁷⁷ In obedience to this rule, the trial court struck the plaintiff's amended pleading that had been filed eleven days before a summary judgment hearing, quite properly construing such hearing as a trial within the meaning of its local rule.⁷⁸ Pointing to Texas Rule of Civil Procedure 63,⁷⁹ which allows a litigant to amend his pleadings without leave of the trial court until seven days before the date of trial, the court of appeals found that the local rule served to enlarge that time period.⁸⁰ Given this inconsistency, the court of appeals invalidated the local rule,⁸¹ finding it in violation of Texas Rule of Civil Procedure 3a which mandates that "no time period provided by these Rules may be altered by local rules . . ."⁸² The court of appeals reversed the action of the trial court in striking the amended pleading, concluding that the trial court improperly enforced the invalid rule.⁸³

VI. PARTIES

Texas Rule of Civil Procedure 60⁸⁴ sets forth the procedure under which a nonparty may intervene in a suit. Under rule 60 an intervenor is not required to secure the trial court's permission prior to intervening in a suit; instead, any party opposing the intervention has the burden to challenge the intervention by a motion to strike.⁸⁵ *Central Mutual Insurance Co. v. Dunker*⁸⁶ concerned a situation where a party sought to take advantage of the liberal intervention practice under rule 60 but, despite the lack of an objection to such action, found it was too late in doing so. Following entry of a final judgment against its insured, an insurer attempted to intervene in the suit and moved to set aside the judgment, arguing the judgment was an out-

may be asserted without sworn denial if properly plead); *Swisher-Orrison Co. v. W.E. Rogers & Son*, 69 S.W.2d 515 (Tex. Civ. App.—Eastland 1934, no writ).

76. 812 S.W.2d 608 (Tex. App.—Dallas 1991, writ denied).

77. *Id.* at 610; DALLAS CIVIL DIST. CT. R. 1.9(a) (Vernon 1986).

78. *Id.* at 610; *accord* *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *Love v. Sneed*, 802 S.W.2d 422, 423 (Tex. App.—Austin 1991, no writ); *Energio Int'l Corp. v. Modern Indust. Heating, Inc.*, 722 S.W.2d 149, 151 (Tex. App.—Dallas 1986, no writ); *Claude Regis Vargo Enter., Inc. v. Bacarisse*, 578 S.W.2d 524, 529 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); *Mainland Sav. Ass'n v. Wilson*, 545 S.W.2d 491, 493 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *Bruce v. McAdoo*, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ); *Jones v. Houston Materials Co.*, 477 S.W.2d 694, 695 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ); *Leche v. Stautz*, 386 S.W.2d 872, 873 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

79. TEX. R. CIV. P. 63.

80. 812 S.W.2d at 610-11.

81. *Id.* at 611.

82. TEX. R. CIV. P. 3a(2).

83. 812 S.W.2d at 611.

84. TEX. R. CIV. P. 60.

85. *Id.*

86. 799 S.W.2d 334 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

growth of a "sham trial."⁸⁷ The trial court denied the insurer's motion on its merits and the insurer appealed from the ruling.⁸⁸ Despite the lack of any objection to its status, the court of appeals held that, since a final judgment had been entered prior to the insurer's intervention, the intervention was untimely.⁸⁹ As a result, the court concluded that the insurer was not a party to the suit and, therefore, could not appeal the judgment.⁹⁰

VII. DISQUALIFICATION OF JUDGES

The use of a retired or visiting judge to hear pretrial matters or to preside over trials has generated its own body of case law in the disqualification area.⁹¹ The legislature amended the Texas Government Code in 1991 to permit a litigant to disqualify an "assigned" judge, provided an objection is filed before the first hearing or trial over which the assigned judge is to preside.⁹² In *Ramey v. Littlejohn*⁹³ the judge assigned to the case was an active judge who regularly presided in the district where the suit was pending; and one of the litigants sought to disqualify her through resort to the statute. Resisting the disqualification, the opposing party argued that the statute only applied to "visiting judges." Nevertheless, reading the provision literally, the appellate court ordered that the judge be disqualified, pointing out that the statute made no distinction between "assigned" visiting judges and "assigned" local judges.⁹⁴

VIII. VENUE

Under the venue scheme established in 1983,⁹⁵ a plaintiff facing a motion to transfer venue need only present prima facie evidence of disputed venue facts;⁹⁶ rule 87 does not permit the trial court to resolve any factual disputes

87. *Id.* at 336.

88. *Id.*

89. *Id.*; accord *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984); *Highlands Ins. Co. v. Lumberman's Mut. Cas. Co.*, 794 S.W.2d 600, 604 (Tex. App.—Austin 1990, no writ); *Express-News Corp. v. Spears*, 766 S.W.2d 885, 888 (Tex. App.—San Antonio 1989, orig. proceeding [leave denied]).

90. 799 S.W.2d at 336-37.

91. See, e.g., *Kellogg v. Martin*, 810 S.W.2d 302 (Tex. App.—Texarkana 1991, no writ) (oral objection to assigned judge insufficient to disqualify judge); *Brown v. Mulanax*, 808 S.W.2d 718 (Tex. App.—Tyler 1991, no writ) (objection filed one hour prior to opening of proceeding was timely); *Meuth v. Hartgrove*, 811 S.W.2d 626, 628 (Tex. App.—Austin 1990, writ denied) (objection to assignment properly overruled where judge was not assigned by the presiding judge of the administrative region); *Lewis v. Leftwich*, 775 S.W.2d 848 (Tex. App.—Dallas 1989, no writ) (objection is filed when tendered to the clerk, regardless of whether the judge is aware of its filing or not); *Money v. Jones*, 766 S.W.2d 307 (Tex. App.—Dallas 1989, writ denied) (objection filed after motion for continuance made and ruled upon was untimely).

92. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon Supp. 1991).

93. 803 S.W.2d 872 (Tex. App.—Corpus Christi 1991, no writ).

94. 803 S.W.2d at 873.

95. See Act of June 17, 1983, 68th Leg., R.S., ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119-2124 [now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 15.001-15.100 (Vernon 1986)].

96. See TEX. R. CIV. P. 87(3)(c) (trial court required to deny motion to transfer venue where plaintiff makes prima facie proof that venue is proper in county of suit).

raised by opposing venue affidavits of the parties.⁹⁷ An appellate court, on the other hand, is required to consider the entire record, including the trial on the merits, in determining whether venue was proper.⁹⁸ Addressing one of the dilemmas posed by these seemingly incongruous rules, the court in *Humphrey v. May*⁹⁹ held that a jury finding on disputed evidence does not control over a trial court's earlier venue ruling made in accordance with rule 87.¹⁰⁰

In reaching this decision, the *Humphrey* court wrestled with the language of section 15.064(b) of the venue statute.¹⁰¹ Given a literal interpretation, section 15.064(b) would permit appellate courts to "second guess" every venue decision by a trial court on the basis of evidence that was not available to the trial court when it made its decision. To avoid this result, the court in *Humphrey* speculated that the provision mandating appellate review of the "entire record" was designed only to 'prevent a plaintiff's "fraud, negligence and exaggeration" as to venue facts that might not be discoverable until after a trial on the merits.'¹⁰² Despite this observation, the *Humphrey* court hesitated to fashion any hard and fast rule of general application. Instead, the court limited its decision to the specific facts of the case, and expressed no opinion on the extent to which a jury's verdict may be considered, under different circumstances, in reviewing a venue decision.¹⁰³

*Conoco, Inc. v. Ruiz*¹⁰⁴ involved venue issues arising from a plaintiff's third suit against the same defendant. Plaintiff's original suit, filed in Harris County, was dismissed as a sanction for discovery abuse. Plaintiff filed a second suit in Zapata County shortly before the dismissal of the first suit. Although the defendant filed a motion to transfer venue of this suit to Harris County, the trial court dismissed the second suit for non-prosecution before ruling on the motion to transfer. When the plaintiff's representative subsequently filed a third lawsuit in yet another county, the defendant again responded by filing a motion to transfer venue.

On appeal, the defendant argued that venue of the third suit was fixed in Harris County by virtue of the dismissal of plaintiff's two earlier suits. As the defendant correctly pointed out, numerous decisions under the pre-existing venue statute and rules had held that venue was fixed in the county named in a plea of privilege¹⁰⁵ whenever a plaintiff nonsuited his action

97. TEX. R. CIV. P. 87; *Humphrey v. May*, 804 S.W.2d 328, 329 (Tex. App.—Austin 1991, writ denied).

98. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).

99. 804 S.W.2d 328 (Tex. App.—Austin 1991, writ denied).

100. *Id.* at 330.

101. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) provides, in pertinent part, that "[i]n determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits."

102. 804 S.W.2d at 330 (citing Dan R. Price, *New Texas Venue Statute: Legislative History*, 15 ST. MARY'S L. J. 855, 874 (1984).

103. 804 S.W.2d at 330.

104. 818 S.W.2d 118 (Tex. App.—San Antonio, September 25, 1991, writ requested).

105. Prior to their amendment in 1983, the rules of procedure governing venue hearings provided for the filing of a "plea of privilege" as the procedural mechanism for challenging a plaintiff's choice of venue. See TEX. R. CIV. P. 84, 86, 87, 88, 89, 93, 120a, 385, 527 (1983).

before the trial court made its venue determination.¹⁰⁶ Further, as the *Conoco* court itself acknowledged, this "venue fixing" policy continued to apply notwithstanding the 1983 amendments to the venue statute and rules.¹⁰⁷ Nevertheless, the court disagreed with the defendant's contention, concluding that the "venue-fixing" rule applies only when a plaintiff voluntarily dismisses his suit.¹⁰⁸ According to the court, neither a dismissal for lack of prosecution nor a dismissal for discovery abuse is voluntary.¹⁰⁹ Therefore, venue of the suit was not fixed in Harris County simply by virtue of the dismissal of plaintiff's two earlier actions.¹¹⁰

Nevertheless, the court held that defendant's motion to transfer venue should have been granted.¹¹¹ Plaintiff alleged that venue of the third suit was proper in Starr County because the defendant, a corporation, maintained an agent who was employed in Starr County.¹¹² Plaintiff failed to introduce any evidence, however, that the agent *resided* in Starr County.¹¹³ Moreover, plaintiff's evidence demonstrated, at best, that the alleged agent was only empowered to order pre-approved supplies of minimal value. Holding that the venue provision in question applied only when an agent possessing broad powers from the defendant resided in the county of suit, the court concluded that plaintiff had failed to make prima facie proof of the required venue facts.¹¹⁴

Pursuant to rule 87,¹¹⁵ the party who files a motion to transfer venue has the duty to request a setting on the motion. The rule also provides that each party is entitled to at least forty-five days notice of the venue hearing, except on leave of court.¹¹⁶ According to the Texas supreme court in *Henderson v. O'Neill*,¹¹⁷ a party may obtain relief by mandamus for a violation of this mandatory notice requirement.¹¹⁸ Significantly, the trial court in *Henderson* made its venue determination immediately before addressing the plaintiff's

Complementing the legislature's 1983 overhaul of the Texas venue statute, Act of June 17, 1983, 68th Leg., R.S., ch. 385 § 1, 1983 Tex. Gen. Laws 2119, 2119-24 [now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 15.001-100 (Vernon 1986)], the Texas supreme court promulgated amended procedural rules in 1983 that eliminated all references to the plea of privilege. See Order of June 15, 1983, reprinted at 46 TEX. B.J. 858-59 (1983)(special tear-out section).

106. See, e.g., *Royal Petroleum Corp. v. McCallum*, 134 Tex. 543, 135 S.W.2d 958, 967 (1940); *Wilson v. Wilson*, 601 S.W.2d 104, 105 (Tex. Civ. App.—Dallas 1980, no writ).

107. 818 S.W.2d at 123; see also *Hendrick Medical Ctr. v. Howell*, 690 S.W.2d 42 (Tex. App.—Dallas 1985, no writ), discussed in 1986 Annual Survey, *supra* note 3, at 501-02.

108. 818 S.W.2d at 123.

109. *Id.*

110. *Id.*

111. *Id.* at 127.

112. TEX. CIV. PRAC. & REM. CODE ANN. § 15.036 (Vernon 1986) provides that "[a] suit against a private corporation . . . may be brought in the county . . . in which the plaintiff resided . . . provided the corporation . . . has an agency or representative in the county . . ."

113. 818 S.W.2d at 127.

114. *Id.* at 126 (citing *Milligan v. Southern Express, Inc.*, 151 Tex. 315, 250 S.W.2d 194, 198 (1952)).

115. TEX. R. CIV. P. 87(1).

116. *Id.*

117. 797 S.W.2d 905 (Tex. 1990).

118. *Id.* at 905.

request for injunctive relief, which the trial court was presumably required to hear well before the forty-five day period could have elapsed. Unfortunately, the opinion in *Henderson* provides trial courts with no guidance as to how they should proceed in these circumstances. In addition, the trial court had apparently "acknowledged" that the timing of its hearing was a deviation from the required procedure.¹¹⁹ At least arguably, therefore, the hearing was expedited with "leave of court." The supreme court did not address this possibility, however, in deciding that the trial court had failed to comply with the rule's notice requirements.¹²⁰

Courts in other cases have held, like *Henderson*, that mandamus is available to correct trial court's decisions regarding venue. For example, mandamus will always lie to correct a void order on venue.¹²¹ *Cone v. Gregory*¹²² reiterated the general rule, however, that appellate courts will not issue mandamus simply to correct an erroneous venue decision.¹²³

IX. LIMITATIONS

*Conoco, Inc. v. Ruiz*¹²⁴ involved the tolling effect of incompetency on the applicable statute of limitations. Ruiz timely filed a suit for personal injury accusing Conoco of negligence. By the time that suit was dismissed for discovery abuse, Ruiz had already filed another suit against Conoco. The trial court also dismissed this second suit for lack of prosecution. In the meantime, a court in an unrelated proceeding determined that Ruiz had been incompetent since the date of his accident, and appointed Ruiz' wife as his guardian. Following this appointment, Ruiz's wife filed yet a third suit against Conoco claiming damages for Ruiz' injuries. Because the guardian filed this latter suit more than five years after Ruiz's accident, however, Conoco alleged that the suit was barred by limitations.¹²⁵ The guardian responded that the two-year statute of limitations had been tolled due to Ruiz's incompetency.

On appeal, Conoco contended that Texas' tolling provision¹²⁶ was intended to protect only those who did not have access to the courts during the period of their legal disability. According to Conoco, therefore, the tolling

119. *Id.*

120. *Id.*

121. See *Dorchester Master Ltd. Partnership v. Anthony*, 734 S.W.2d 151, 152 (Tex. App.—Houston [1st Dist.] 1987) (orig. proceeding) (trial court had no authority to consider second venue motion).

122. 814 S.W.2d 413 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]).

123. *Id.* at 414.

124. 818 S.W.2d 118 (Tex. App.—San Antonio, September 25, 1991, writ requested).

125. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1986) requires a party suing for personal injury to bring his suit not later than two years after the cause of action accrued.

126. TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(a) (Vernon Supp. 1991) provides, in pertinent part: "For the purposes of this subchapter, a person is under a legal disability if the person is: . . . (2) of unsound mind." If a person is under a legal disability when the cause of action accrues, the period of the disability is not included in the limitations period. *Id.* § 16.001(b).

statute did not apply because Ruiz had access to the courts after the accident, as evidenced by his filing of two prior lawsuits. Although the court of appeals agreed with Conoco that the purpose of the tolling provision was to suspend limitations only for those who lacked access to the courts,¹²⁷ it concluded that the guardian could take advantage of the tolling statute despite Ruiz' filing of the two earlier lawsuits.¹²⁸ The court held that the tolling provision expressly preserves causes of action for those who, because of mental incompetency, are unable to protect their legal right to sue.¹²⁹ Because Ruiz was of unsound mind at all times subsequent to the accident, Ruiz had no opportunity to protect his legal rights until a guardian was appointed for him.¹³⁰

A different type of tolling provision was at issue in *Vale v. Ryan*.¹³¹ The Texas savings statute¹³² permits a plaintiff who has timely filed a claim for relief in one court to refile that claim in a second court if: (1) the first suit is dismissed for lack of jurisdiction, and (2) the second suit is commenced within sixty days after the first suit's dismissal becomes final.¹³³ The plaintiff in *Vale* originally sued in federal court asserting a violation of her civil rights and several pendent state law claims. Although the federal court dismissed all of the plaintiff's claims against one defendant with prejudice, it refused to sever those claims from plaintiff's claims against the other defendants.¹³⁴ Therefore, plaintiff could not appeal the dismissal for several years. In the meantime, plaintiff filed a state court lawsuit against the defendant asserting the same causes of action that she had asserted as pendent claims in the federal suit. Plaintiff did not file this second suit, however, until more than sixty days after the federal court entered its order of dismissal. As a result, the trial court in the state lawsuit granted summary judgment in defendant's favor on the basis of limitations.

The court of appeals reversed the judgment, concluding that the savings statute operated to toll limitations during the pendency of plaintiff's appeal from the federal court's order of dismissal.¹³⁵ Although plaintiff did not bring her state court suit until approximately five months after the trial court's order of dismissal, that order was not *final* within the meaning of the savings statute until plaintiff's appeal of the order was decided.¹³⁶ The court, therefore, held that plaintiff complied with the sixty-day requirement of the savings statute by filing her state court lawsuit before the Fifth Circuit issued a ruling.¹³⁷ The court of appeals also rejected defendants' alternative argument that the savings statute did not apply to the federal court's order

127. 818 S.W.2d at 121.

128. *Id.* at 122.

129. *Id.* at 121.

130. *Id.* at 122.

131. 809 S.W.2d 324 (Tex. App.—Austin 1991, no writ).

132. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (Vernon 1986).

133. *Id.*

134. 809 S.W.2d at 325.

135. *Id.* at 327.

136. *Id.*

137. *Id.* at 326-27.

of dismissal because it was not predicated on a lack of jurisdiction.¹³⁸ The court ruled that the order of dismissal constituted a dismissal for "lack of jurisdiction," even though the federal court had merely declined to consider the pendent claims as a matter of discretion.¹³⁹ According to the court of appeals, plaintiff was ultimately denied the right to litigate her claims in federal court, and "[t]he effect of the order as one of dismissal for want of jurisdiction cannot be obviated by means of nomenclature."¹⁴⁰

Finally, in *Eckerdt v. Frostex Foods, Inc.*¹⁴¹ the Austin court of appeals held that the one-year deadline established by the Texas Commission on Human Rights Act¹⁴² for bringing suits alleging sex discrimination does not violate due process.¹⁴³ In an earlier opinion,¹⁴⁴ the court had held that this deadline was jurisdictional, and that the Commission's failure to send timely notice of a right to sue did not toll the running of the one-year time period.¹⁴⁵ The court expanded this holding in *Eckerdt* by explicitly finding that the Texas statute did not require the plaintiff to postpone the filing of her suit until she received the right-to-sue letter.¹⁴⁶ According to the court, therefore, the dismissal of plaintiff's suit resulted from her own negligence rather than a procedural flaw in the statute.¹⁴⁷

X. DISCOVERY

A. Discovery Procedures

Rule 171 of the Texas Rules of Civil Procedure¹⁴⁸ allows a court, in exceptional cases and for good cause, to appoint a special master to perform specified tasks in the manner of a master of chancery in a court of equity.¹⁴⁹ The Texas supreme court outlined the applicable standards for this rarely-used power in *Simpson v. Canales*.¹⁵⁰ In *Simpson*, the trial court had appointed a special master to oversee discovery, conduct hearings, and make rulings on all pre-trial discovery matters, and had ordered that the fees for the master be apportioned between the parties.¹⁵¹ The supreme court granted mandamus relief, holding that the case, while complex, was not exceptional, and that there was not good cause for a blanket referral of all

138. *Id.* at 327.

139. *Vale*, 809 S.W.2d at 327.

140. *Id.* (quoting *Burford v. Sun Oil Co.*, 186 S.W.2d 306, 318 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.)).

141. 802 S.W.2d 70 (Tex. App.—Austin 1990, no writ).

142. TEX. REV. CIV. STAT. ANN. art. 7.01(a) (Vernon 1987).

143. 802 S.W.2d at 72.

144. *Green v. Aluminum Co. of America*, 760 S.W.2d 378 (Tex. App.—Austin 1988, no writ).

145. *Id.* at 380.

146. 802 S.W. 2d at 72.

147. *Id.*

148. TEX. R. CIV. P. 171.

149. *Id.*

150. 806 S.W.2d 802 (Tex. 1991).

151. *Id.* at 804-05.

discovery matters to a special master.¹⁵² Acknowledging the paucity of Texas case law on the use of masters,¹⁵³ the court looked to federal law in concluding that the requirement of an "exceptional case" is not satisfied merely because the case is complex or time-consuming, or because the trial court is busy.¹⁵⁴

Two decisions of note during the Survey period emphasized that the permissible forms of discovery in Texas are limited to those set forth in rule 166b(1).¹⁵⁵ In *Amis v. Ashworth*¹⁵⁶ the court held that a party was not entitled under rules 166b(2)(c)¹⁵⁷ and 167¹⁵⁸ to obtain access to the property of his opponent for purposes of creating a videotaped reenactment of the events giving rise to the lawsuit.¹⁵⁹ The court stated, however, that it should not be understood as prohibiting the entry onto the opposing party's property for purposes of photographing the existing conditions and thereafter recreating them at another site.¹⁶⁰ Similarly, in *Moore v. Wood*¹⁶¹ the court rejected an expansive view of the forms of discovery, as opposed to the scope of discovery, in holding that a personal injury plaintiff could not be compelled to submit to an examination by a vocational rehabilitation specialist, who was neither a doctor nor a psychologist.¹⁶²

Two cases decided during the survey period provide guidance on the proper manner of producing documents in discovery. The San Antonio court of appeals held that the trial court erred in allowing the plaintiffs access to their opponent's files to search for discoverable documents in *Texaco, Inc. v. Dominguez*.¹⁶³ Notwithstanding the plaintiffs' concern that the defendant might be overlooking responsive documents in its own review of the files, the court concluded that the rules of discovery were promulgated to prevent just such a "fishing expedition."¹⁶⁴ In *Steenbergen v. Ford Motor Co.*¹⁶⁵ the appellate court found no error in the trial court's order allowing the defendant to produce the documents it had collected over the years relating to the absence of passive restraint systems in its vehicles in a "reading room" set up in its Michigan headquarters.¹⁶⁶

152. *Id.* at 812. The court concluded that mandamus was appropriate because limiting the parties to their remedy on appeal would deny them any effective relief. *Id.*

153. *Id.* at 805.

154. 806 S.W.2d at 811 (citing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)). The court's opinion also includes an extended discussion of the office of a master in chancery at common law. *Id.* at 806-08. Justice Mauzy, in a separate concurrence, found this discussion of history inappropriate. *Id.* at 812 (Mauzy, J., concurring).

155. TEX. R. CIV. P. 166b(1).

156. 802 S.W.2d 374 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]).

157. TEX. R. CIV. P. 166b(2)(c).

158. TEX. R. CIV. P. 167.

159. *Amis*, 802 S.W.2d at 376-77. The court noted that the question before it was entirely different from the question of whether a videotaped reenactment, made without having entered onto the property of another, is properly admissible in evidence. *Id.* at 377.

160. *Id.*

161. 809 S.W.2d 621 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

162. *Id.* at 623-24.

163. 812 S.W.2d 451, 456 (Tex. App.—San Antonio 1991, orig. proceeding).

164. *Id.* at 455-56.

165. 814 S.W.2d 755 (Tex. App.—Dallas, June 18, 1991, writ requested).

166. *Id.* at 758-59.

Rule 188(1)¹⁶⁷ permits a deposition in another state to be taken before a person who has been authorized, either under the law of Texas or the other state, to administer oaths at the location at which the examination is held.¹⁶⁸ The court in *Clone Computer Distributors of America, Inc. v. State of Texas*¹⁶⁹ interpreted this provision as permitting a telephone deposition of an out-of-state witness to be taken by a court reporter located in Texas.¹⁷⁰ The court concluded that the deponent in such a situation is in the vocal and aural presence of the court reporter, thereby satisfying the requirement of rule 188(1)¹⁷¹ that the deposition be taken "before" the person administering the oath.¹⁷² The court also rejected the defendants' argument that physical presence is required so that the court reporter will be able to identify the person who was sworn, stating that in the deposition context, the witness takes a second oath before a notary public when he or she signs the deposition.¹⁷³

B. Privileges and Exemptions

The Texas supreme court answered the question of how long the attorney work product privilege endures in *Owens-Corning Fiberglas Corp. v. Caldwell*.¹⁷⁴ The court held that the underlying purpose of the work product privilege would be totally defeated if the privilege were limited to documents prepared in the particular case in which discovery was sought.¹⁷⁵ Moreover, the court expressed the view that a party that is a repeat litigant must be allowed to develop an overall legal strategy for all of the cases in which it is involved.¹⁷⁶

The decision in *Owens-Corning* was also significant for its holding that the work product privilege was not waived by the assertion of a state-of-the-art defense, which the supreme court viewed not as a true affirmative defense, but rather as a description of Owens-Corning's rebuttal evidence.¹⁷⁷ Thus, the court held that the rule of *Ginsberg v. Fifth Court of Appeals*¹⁷⁸ prohibiting the offensive assertion of a privilege was not implicated.¹⁷⁹

167. TEX. R. CIV. P. 188(1).

168. *Id.*

169. 819 S.W.2d 593 (Tex. App.—Dallas, October 21, 1991, n.w.h.) (to be reported at 819 S.W.2d 593).

170. *Id.* at 598.

171. TEX. R. CIV. P. 188(1).

172. 819 S.W.2d at 598. Interestingly, the court noted that the appellants did not challenge the authority of the court reporter to administer oaths. *Id.* Therefore the court did not have to address the question of whether the reporter had to be authorized to administer oaths in the state where the witness was located.

173. *Id.* at 599. See TEX. R. CIV. P. 205. The court suggested that if the deposition is not signed a motion to suppress might be appropriate. 819 S.W.2d at 599.

174. 35 Tex. Sup. Ct. J. 89 (November 6, 1991).

175. *Id.* at 90.

176. *Id.*

177. *Id.* at 91-92.

178. 686 S.W.2d 105 (Tex. 1985).

179. 35 Tex. Sup. Ct. J. at 92. See also *Dossey v. Salazar*, 808 S.W.2d 146, 147-48 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [leave denied])(plaintiffs not entitled to

Under rule 166b(4),¹⁸⁰ the party seeking to exclude documents from discovery on the basis of a privilege or exemption has the burden of supporting such claim with affidavits or testimony.¹⁸¹ The trial court must then determine if an in camera inspection of some or all of the documents is necessary.¹⁸² In *State v. Lowry*¹⁸³ the supreme court held that the trial court abused its discretion in failing to conduct an in camera examination of citizen complaint letters compiled by the Attorney General's office through pre-suit civil investigative demands when those materials were later sought in discovery by the defendants in an antitrust action brought by the state.¹⁸⁴ In *Enron Oil & Gas Co. v. Flores*,¹⁸⁵ on the other hand, the court held that it was not an abuse of discretion to order the production, without prior in camera review, of documents allegedly containing trade secrets.¹⁸⁶ The court reasoned that the trial judge could have reasonably determined that the documents themselves would not have assisted him in making his decision.¹⁸⁷

Finally, the significance of a party's designation of experts was the subject of two noteworthy cases during the survey period. *Aetna Casualty & Surety Co. v. Blackmon*¹⁸⁸ stands for the proposition that the mere designation of a person as an expert witness does not automatically waive any privilege that might otherwise attach to communications with that person.¹⁸⁹ However, any privileges that might be asserted as to specific matters the expert relied upon as a basis for his testimony are, of course, waived.¹⁹⁰ In *Enserch Corp. v. Crowley*¹⁹¹ the court distinguished two recent supreme court decisions¹⁹² in holding that the trial court did not abuse its discretion in preventing the defendant from obtaining discovery of documents in the possession of an expert hired in anticipation of litigation, where the plaintiffs had not yet designated which of their experts would testify.¹⁹³

C. Duty to Supplement Discovery

As in prior years, numerous decisions during the survey period addressed

defendant's mental health and medical records merely to try to gain evidence that defendant was driving under the influence of alcohol at time of accident that was subject of suit).

180. TEX. R. CIV. P. 166b(4).

181. *Id.*

182. *Id.*

183. 802 S.W.2d 669 (Tex. 1991).

184. *Id.* at 674. See also *Northeast Community Hosp. v. Gregg*, 815 S.W.2d 320, 327 (Tex. App.—Fort Worth 1991, no writ) (trial court abused discretion in failing to review tendered hospital peer review documents in camera).

185. 810 S.W.2d 408 (Tex. App.—San Antonio 1991, orig. proceeding [leave denied]).

186. *Id.* at 413.

187. *Id.*

188. 810 S.W.2d 438 (Tex. App.—Corpus Christi 1991, orig. proceeding).

189. *Id.* at 440.

190. *Id.*

191. 800 S.W.2d 685 (Tex. App.—Fort Worth 1990, orig. proceeding [leave denied]).

192. See *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556 (Tex. 1990); *Axelsson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).

193. 800 S.W.2d at 686.

the duty to supplement discovery responses imposed by rules 166b(6)¹⁹⁴ and 215(5).¹⁹⁵ The supreme court once again led the way, exhorting the lower courts to take literally the rule that a witness whose identity is not timely provided in response to interrogatories may not be permitted to testify absent a showing of good cause.¹⁹⁶ For example, the supreme court held in *Alvarado v. Farah Manufacturing Co.*¹⁹⁷ that a plaintiff cannot avoid the sanction of exclusion merely by designating the undisclosed witness as a rebuttal witness, at least where he has reason to know prior to trial that such witness's testimony may be needed.¹⁹⁸ Similarly, the court disapproved of the Austin court of appeals' decision in *Jamail v. Anchor Mortgage Services, Inc.*,¹⁹⁹ a case cited in the 1991 Annual Survey, which had held that the admission of the testimony of an undisclosed corporate representative of the defendant regarding lending regulations was not error, because he was not a person with knowledge of facts relating directly to plaintiff's cause of action.²⁰⁰ The supreme court rejected the fine distinction drawn by the lower court in favor of a straight-forward interpretation of rule 166b(2)(d),²⁰¹ which states that "[a] person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter."²⁰² Because the defendant's representative had knowledge of his employee's mortgage lending practices, he was within the scope of plaintiff's interrogatory.²⁰³

The Amarillo court of appeals held in *Smith v. Southwest Feed Yards, Ltd.*²⁰⁴ that the defendant could not testify where he failed to list himself as a person with knowledge of relevant facts in response to plaintiff's interrogatories.²⁰⁵ In doing so, the court declined to follow two decisions of another court of appeals that reached a contrary result.²⁰⁶ The court rejected defendant's argument that good cause existed for allowing the testimony that was based upon, among other things, the fact that the defendant notified plaintiff seven days prior to trial of his intent to appear as a witness, in accordance with the trial court's pretrial order.²⁰⁷

194. TEX. R. CIV. P. 166b(6).

195. TEX. R. CIV. P. 215(5).

196. *Id.*; *Alvarado v. Farah Mfg. Co.*, 34 Tex. Sup. Ct. J. 107, 108-09 (November 21, 1990); *Jamail v. Anchor Mortgage Services, Inc.*, 797 S.W.2d 369, 375 (Tex. App.—Austin 1990), writ denied per curiam, 809 S.W.2d 221 (Tex. 1991).

197. 34 Tex. Sup. Ct. J. 107 (November 21, 1990).

198. *Id.* at 109. In its opinion in *Alvarado*, the court chronicled its decisions over the last six years on this subject, in each of which it rejected the reasons proffered as good cause for the late designation of a witness, as if to signal exasperation at having to reiterate the standard so many times. *Id.* at 108-09.

199. 797 S.W.2d 369 (Tex. App.—Austin 1990), writ denied per curiam, 809 S.W.2d 221 (Tex. 1991).

200. *Id.* at 375.

201. TEX. R. CIV. P. 166b(2)(d).

202. *Id.*; *Jamail*, 809 S.W.2d at 223.

203. *Id.*

204. 811 S.W.2d 717 (Tex. App.—Amarillo, June 18, 1991, writ requested).

205. *Id.* at 721.

206. *Id.* at 720-21. In *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 57 (Tex. App.—Houston [1st Dist.] 1990, writ granted) and *NCL Studs, Inc. v. Jandl*, 792 S.W.2d 182, 185 (Tex. App.—Houston [1st Dist.] 1990, writ denied) the court reached a contrary result.

207. 811 S.W.2d at 721.

The Texas courts also addressed certain procedural issues raised by the duty to supplement during the past year. In *Ticor Title Insurance Co. v. Lacy*,²⁰⁸ the supreme court stated that a party may rely on a co-party's interrogatories to their common opponent and may object to the testimony of an undisclosed expert, even if the party who propounded the interrogatories does not.²⁰⁹ In *Service Lloyds Insurance Co. v. Harbison*,²¹⁰ the high court held that the designation of an expert witness was timely, without a showing of good cause, where the trial court overruled the defendant's objection to plaintiff's expert witness interrogatory and directed the defendant to answer such interrogatory within thirty days of trial.²¹¹ The court in *Jones v. Kinder*²¹² held that verification of a supplemental answer to interrogatories is not necessary, and the lack of a verification did not require the exclusion of an expert witness identified in such supplemental answer.²¹³ Finally, one court of appeals held in two cases that a trial court's order granting or denying a pretrial motion to strike the designation of an expert witness as untimely is not subject to mandamus.²¹⁴

While good cause for allowing the testimony of an untimely-designated witness may be difficult to establish, several cases decided during the Survey period demonstrate that it is not impossible.²¹⁵ For example, where a party loses the services of its expert witness shortly before trial through no fault of its own, the court may properly allow a new expert to be designated and to testify.²¹⁶ Similarly, one court has held that where the self-proving affidavit of a will was struck at trial, the party offering the will was entitled to call a witness to its execution to testify, despite the fact that the witness had not been previously identified in response to interrogatories.²¹⁷ And in a case involving the failure to supplement the production of documents, *First Interstate Bank of Bedford v. Bland*,²¹⁸ the court found that good cause existed for the admission of photographs that were not taken until immediately prior to trial.²¹⁹

208. 803 S.W.2d 265 (Tex. 1991).

209. *Id.* at 266; see also *Ward v. O'Connor*, 816 S.W.2d 446, 447 (Tex. App.—San Antonio 1991, no writ) (identification of fact and expert witnesses in response to one defendant's interrogatories was disclosure of same information to all, especially where supplementation was obviously intended for all pending discovery).

210. 35 Tex. Sup. Ct. J. 95 (November 6, 1991).

211. *Id.* at 97.

212. 807 S.W.2d 868 (Tex. App.—Amarillo 1991, no writ).

213. *Id.* at 872-73.

214. *Southwestern Bell Tel. Co. v. Sanderson*, 810 S.W.2d 485, 487 (Tex. App.—Beaumont 1991, orig. proceeding); *City of Port Arthur v. Sanderson*, 810 S.W.2d 476, 477 (Tex. App.—Beaumont 1991, orig. proceeding).

215. *Wells v. HCA Health Services of Texas, Inc.* 806 S.W.2d 850 (Tex. App.—Fort Worth 1991, writ denied); *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.—Eastland 1991, writ denied); *First Interstate Bank of Bedford v. Bland*, 810 S.W.2d 277 (Tex. App.—Fort Worth 1991, no writ).

216. *Wells*, 806 S.W.2d at 852-53.

217. *Broach*, 800 S.W.2d at 679.

218. 810 S.W.2d 277 (Tex. App.—Fort Worth 1991, no writ).

219. *Id.* at 288; see also *Black v. Texas Dep't of Labor & Standards*, 816 S.W.2d 496, 499 (Tex. App.—Texarkana, Aug. 20, 1991, writ requested) (allowing introduction of list of claims that was prepared and provided to the other side only eight days before trial).

D. Sanctions

Probably the most significant discovery cases during the Survey period were two supreme court decisions, *TransAmerican Natural Gas Corp. v. Powell*²²⁰ and *Braden v. Downey*,²²¹ which sharply limited the scope of a trial court's discretion in imposing severe sanctions against a party for discovery abuse. In the wake of these decisions, the continued validity of numerous cases decided over the last several years, which emphasized deference to the trial court's determination of an appropriate sanction, must be strongly questioned.

In *TransAmerican* the trial court struck the plaintiff's pleadings and dismissed its action as a sanction for the failure of its president to appear at a deposition, and the court of appeals denied the plaintiff's petition for a writ of mandamus.²²² The plaintiff fared better in the supreme court, however, which held that the imposition of the ultimate sanction of dismissal was not "just" within the meaning of rule 215.²²³ The court established a two-part test for determining the appropriateness of discovery sanctions.²²⁴ First, there must be a direct relationship between the objectionable conduct and the sanction to be imposed.²²⁵ Therefore, the sanction must both target the abuse and attempt to remedy the prejudice to the innocent party.²²⁶ Further, the sanction should be imposed upon the offender, and the trial court must try to determine to whom the offensive conduct is attributable: the party, counsel, or both.²²⁷

The second aspect of the test enunciated by the supreme court is that the sanction imposed must not be excessive in relation to the wrongful conduct.²²⁸ A discovery sanction should be no more severe than necessary to fulfill its legitimate purposes.²²⁹ Moreover, courts must consider the availability of less severe sanctions and whether lesser sanctions would serve the goal of promoting compliance with the discovery rules.²³⁰

Finally, having defined the boundaries of a trial court's discretion under rule 215,²³¹ the supreme court went on to note that the imposition of very severe sanctions is limited not only by the foregoing standards, but also by constitutional due process.²³² Thus, the court held that "[d]iscovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption

220. 811 S.W.2d 913 (Tex. 1991).

221. 811 S.W.2d 922 (Tex. 1991).

222. 811 S.W.2d at 915-16.

223. *Id.* at 919. See TEX. R. CIV. P. 215(2)(b) and (3).

224. 811 S.W.2d at 917.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. 811 S.W.2d at 917.

230. *Id.*

231. TEX. R. CIV. P. 215.

232. 811 S.W.2d at 917.

that its claims or defenses lack merit."²³³ The court noted, however, that a party's refusal to produce material evidence, despite the imposition of lesser sanctions, would entitle the trial court to presume that a claim or defense lacked merit and to dispose of it through the imposition of sanctions.²³⁴

The supreme court undertook a similar analysis in *Braden*, holding that the trial court abused its discretion in requiring the payment of severe monetary sanctions and performance of community service before such sanctions could be properly appealed.²³⁵ Citing *TransAmerican*, which was decided the same day, the court stated that monetary sanctions likewise should not ordinarily be used to dispose of litigation.²³⁶ Accordingly, if the monetary sanction imposed is so severe that it threatens a party's continuation of the litigation, an adequate remedy on appeal is assured only if payment of the sanction is deferred until a final judgment is rendered.²³⁷ The court then adopted the procedure established by the Fifth Circuit in *Thomas v. Capital Security Services, Inc.*,²³⁸ a rule 11²³⁹ case, which requires a trial court that imposes monetary sanctions to either (1) provide that the sanction is payable only upon final judgment, or (2) make express written findings, after a prompt hearing, as to why the sanction does not have the effect of precluding access to the courts.²⁴⁰

The intermediate appellate courts appear to be uncertain about how to implement this new mandate from the supreme court. On one hand, the court in *Jaques v. Texas Employers' Insurance Association*²⁴¹ reversed the imposition of a dismissal sanction where the appellant had ignored a trial court order to answer interrogatories.²⁴² The court read *TransAmerican* to require imposition of lesser sanctions first, stating that the trial court could have ordered compliance a second time and threatened the "death penalty" consequence if it was ignored again.²⁴³ In *McConnell v. Memorial Construction Co.*²⁴⁴ the same court of appeals upheld a trial court's order striking the defendant's pleadings as a sanction for his failure to file a status report or appear at a status conference.²⁴⁵ The majority based its decision on the authority of *Koslow's v. Mackie*,²⁴⁶ but the dissent argued that the standards set

233. *Id.* at 918.

234. *Id.*

235. *Braden*, 811 S.W.2d at 929-30. Significantly, the court specifically noted that it did not criticize the creative sanction of requiring a party's attorney to perform community service. *Id.* at 930.

236. *Id.* at 929.

237. *Id.*

238. 836 F.2d 866 (5th Cir. 1988).

239. FED. R. CIV. P. 11

240. 836 F.2d at 882-83 n.23; *Braden*, 811 S.W.2d at 929.

241. 816 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1991, no writ)

242. *Id.* at 131.

243. *Id.*

244. No. 01-90-00597-CV, (Tex. App.—Houston [1st Dist.], April 15, 1991, writ requested).

245. *Id.*, slip op. at 1-2.

246. 796 S.W.2d 700 (Tex. 1990) (striking pleadings and rendering default judgment are available as sanctions within the discretion of the trial court for disobeying a pretrial order).

out in *TransAmerican* should have been applied.²⁴⁷ Finally, in *Dempsey v. Pfizer, Inc.*,²⁴⁸ the court upheld, without even mentioning *TransAmerican*, the dismissal of most of the plaintiff's claims as a sanction for their destruction of evidence.²⁴⁹

The supreme court decided two other procedural questions regarding sanctions during the survey period. First, in *O'Connor v. Sam Houston Medical Hospital, Inc.*²⁵⁰ the court held that a court of appeals does not have the power, under Texas Rule of Appellate Procedure 60(a),²⁵¹ to dismiss an appeal as a sanction for the appellant's failure to comply with an order of the trial court relating to post-judgment discovery.²⁵² Instead, the court construed rule 60(a)²⁵³ as applying only to a party's failure to comply with an order of the court of appeals.²⁵⁴ The court left open the question of whether a court of appeals may ever properly dismiss an appeal based on such conduct, perhaps after the appellate court first issues its own order requiring compliance with the trial court's order.²⁵⁵ In *Felderhoff v. Knauf*²⁵⁶ the supreme court held that a plaintiff who has taken a nonsuit is not precluded from complaining on appeal of monetary sanctions imposed by the trial court prior to dismissal.²⁵⁷

Finally, Texas courts continue to grapple with the application of the discovery sanction rules in non-traditional settings. For example, in *Schenck v. Ebby Halliday Real Estate, Inc.*²⁵⁸ the court upheld the exclusion of the testimony of defendants' expert witness, an appraiser, who trespassed on plaintiffs' property in order to perform his appraisal.²⁵⁹ In *Rizk v. Millard*²⁶⁰ on the other hand, the court held that rule 215²⁶¹ provided no authority for the imposition of sanctions against a party for repudiating a settlement that was allegedly reached during mediation.²⁶²

E. Miscellaneous

Every trial practitioner should take note of the Texas supreme court's decision in *London Market Companies v. Schattman*.²⁶³ There, the defendants attempted to show good cause for the late filing of their responses to plaintiffs' interrogatories and document request, arguing the existence of an al-

247. *McConnell*, No. 01-90-00597-CV, slip op. at 4 (O'Connor, J., dissenting).

248. 813 S.W.2d 205 (Tex. App.—Fort Worth 1991, no writ).

249. *Id.* at 208-09.

250. 807 S.W.2d 574 (Tex. 1991).

251. TEX. R. APP. P. 60(a).

252. 807 S.W.2d at 576.

253. TEX. R. APP. P. 60(a).

254. 807 S.W.2d at 576.

255. *Id.*

256. 819 S.W.2d 110 (Tex. 1991).

257. *Id.* at 111.

258. 803 S.W.2d 361 (Tex. App.—Fort Worth 1990, no writ).

259. *Id.* at 372-73.

260. 810 S.W.2 318 (Tex. App.—Houston [14th Dist.] 1991, no writ).

261. TEX. R. CIV. P. 215.

262. 810 S.W.2d at 321.

263. 811 S.W.2d 550 (Tex. 1991).

leged oral agreement with plaintiffs' counsel that they could take as much time as they needed. The supreme court rejected this argument, reasoning that permitting the subjective belief of only one party to constitute good cause would undermine the purpose of rule 11,²⁶⁴ which is the avoidance of disputes as to the existence or terms of such oral agreements.²⁶⁵

Rule 737²⁶⁶ of the Texas Rules of Civil Procedure authorizes trial courts to "entertain suits in the nature of bills of discovery."²⁶⁷ In *Ross Stores, Inc. v. Redken Laboratories, Inc.*²⁶⁸ the supreme court held that when a bill of discovery is filed against a third party, against whom no further suit is contemplated, the discovery order entered by the trial court is an end in itself and operates as a mandatory injunction against the discovery defendant.²⁶⁹ Thus, an appeal will lie from such an order.²⁷⁰

XI. SUMMARY JUDGMENT

Summary judgment procedure was the topic of a number of decisions during the Survey period. The most significant was *Roark v. Stallworth Oil and Gas, Inc.*²⁷¹ in which the Texas supreme court held that "an unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the [non-movant] does not object to the lack of . . . a pleading in either its written response or before the rendition of judgment".²⁷² The court distinguished one of its own prior decisions²⁷³ in reaching this result and disapproved of numerous conflicting courts of appeals' opinions.²⁷⁴

*McConnell v. Southside Independent School District*²⁷⁵ and *Roberts v. Southwest Texas Methodist Hospital*²⁷⁶ both involved the rule 166a(c)²⁷⁷ requirement that a motion for summary judgment expressly set forth the grounds on which it is based.²⁷⁸ In *McConnell*, the court held that this requirement was satisfied when the grounds for summary judgment were set forth in a brief that accompanied the motion.²⁷⁹ The *Roberts* decision

264. TEX. R. CIV. P. 11 (requiring agreements between counsel to be in writing, signed, and filed with the court).

265. 811 S.W.2d at 552.

266. TEX. R. CIV. P. 737.

267. *Id.*

268. 810 S.W.2d 741 (Tex. 1991).

269. *Id.* at 742.

270. *Id.* Compare with *Collier Services Corp. v. Salinas*, 812 S.W.2d 372, 375 (Tex. App.—Corpus Christi 1991, no writ)(post-judgment discovery orders are not final and appealable, although mandamus is available to correct abuse of discretion); *Pelt v. State Bd. of Ins.*, 802 S.W.2d 822, 829 (Tex. App.—Austin 1991, no writ)(appeal from denial of motion to quash administrative subpoena dismissed for lack of jurisdiction).

271. 813 S.W.2d 492 (Tex. 1991).

272. *Id.* at 494.

273. See *DeBord v. Muller*, 446 S.W.2d 299 (Tex. 1969).

274. 813 S.W.2d at 494 n.2.

275. 814 S.W.2d 247 (Tex. App.—Austin 1991, writ requested)(per curiam).

276. 811 S.W.2d 141 (Tex. App.—San Antonio 1991, writ denied).

277. TEX. R. CIV. P. 166a(c).

278. *Id.*

279. 814 S.W.2d at 248.

teaches that, although the non-movant must specially except to a summary judgment motion that states no grounds in order to preserve that complaint for appeal, there is no such obligation if the motion states at least one ground.²⁸⁰ In the latter case, then, a summary judgment cannot be upheld on grounds that were not asserted, even if the evidence supports them and the responding party did not except to the motion.²⁸¹

Rule 166a(c)²⁸² also requires a minimum of twenty-one days notice of a summary judgment hearing.²⁸³ In *De Los Santos v. Southwest Texas Methodist Hospital*²⁸⁴ the court held that rule 21a,²⁸⁵ which adds an additional three days to time periods for responding when service by mail is used,²⁸⁶ does not require twenty-four days notice of a summary judgment hearing when such notice is given by mail.²⁸⁷ Summary judgment hearings were also addressed by the Fourteenth District court of appeals in *Martin v. Cohen*.²⁸⁸ There the court held that a trial judge need not actually hold an oral hearing on a motion for summary judgment.²⁸⁹ The court acknowledged that its conclusion conflicted with the decision of another court of appeals,²⁹⁰ perhaps setting the stage for the supreme court to resolve the question.

As in prior years, the sufficiency and proper method of presenting summary judgment evidence was also the subject of a number of decisions. In *Anderson v. Snider*²⁹¹ the supreme court held that the affidavit of an interested expert witness, such as the defendant in a malpractice suit, can be sufficient to support a summary judgment under appropriate circumstances.²⁹² The court concluded, however, that the defendant's affidavit in the case before it consisted merely of incompetent legal conclusions and, as such, was nothing more than a sworn denial of the plaintiff's claims.²⁹³ In *Continental Savings Association v. Collins*²⁹⁴ the court rejected the argument that rule 166a(c),²⁹⁵ which forbids the introduction of oral testimony at a summary judgment hearing,²⁹⁶ precluded the trial court's reliance on a stipulation made in open court.²⁹⁷

Finally, another court has adopted the procedure outlined by the Dallas court of appeals in *Deerfield Land Joint Venture v. Southern Union Realty*

280. 811 S.W.2d at 145.

281. *Id.* at 146.

282. TEX. R. CIV. P. 166a(c).

283. *Id.*

284. 802 S.W.2d 749 (Tex. App.—San Antonio 1990, no writ).

285. TEX. R. CIV. P. 21a.

286. *Id.*

287. 802 S.W.2d at 754.

288. 804 S.W.2d 201 (Tex. App.—Houston [14th Dist.] 1991, no writ).

289. *Id.* at 202-03.

290. *Id.* at 203, citing *Williams v. Carpenter*, 767 S.W.2d 953 (Tex. App.—Beaumont 1989, no writ).

291. 808 S.W.2d 54 (Tex. 1991)(per curiam).

292. *Id.* at 55.

293. *Id.*

294. 814 S.W.2d 829 (Tex. App.—Houston [14th Dist.] 1991, no writ).

295. TEX. R. CIV. P. 166a(c).

296. *Id.*

297. 814 S.W.2d at 833.

Co.²⁹⁸ for ensuring that depositions are properly before the court in summary judgment proceedings.²⁹⁹ The court in *Hollingsworth v. King*³⁰⁰ determined that, notwithstanding the addition in 1990 of a new section to rule 166a³⁰¹ relating to the filing of discovery materials,³⁰² authenticating the deposition with the court reporter's certificate and, where a copy or excerpts are used, the attorney's own affidavit remains the better practice.³⁰³ Indeed, one court has held that the failure to properly authenticate deposition excerpts is substantive and, accordingly, can be raised for the first time on appeal.³⁰⁴

XII. JURY QUESTIONS

The proper manner of preserving objections to the court's charge was the subject of several significant decisions during the survey period. *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*³⁰⁵ demonstrates the necessity of clarity in objecting to the charge. In that case, the supreme court held that defense counsel's objections to a cluster of jury questions relating to a tortious interference claim did not include an objection to the omission of a separate question as to damages.³⁰⁶ Indeed, the majority viewed counsel's statement as a stipulation that a separate question was not necessary, since the damages recoverable under the tort theory of liability would be the same as those recoverable under the contract theory.³⁰⁷ Justice Gonzalez vigorously dissented, arguing that the majority's interpretation of counsel's objections and statements was erroneous.³⁰⁸ In the dissent's view, "[t]he unfortunate lesson to be learned from today's opinion is that one should never 'agree' to anything in open court for fear that an imperfect choice of words will be given an interpretation far beyond what was intended."³⁰⁹

Trial practitioners should also note the decision in *Peterson v. Dean Witter Reynolds, Inc.*³¹⁰ in which the Dallas court of appeals held that the defendant did not preserve error with respect to the trial court's failure to submit a question to the jury on his waiver defense.³¹¹ Although the opinion is not

298. 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied).

299. *Hollingsworth v. King*, 810 S.W.2d 772, 773-74 (Tex. App.—Amarillo), writ denied per curiam, 816 S.W.2d 340 (Tex. 1991); see also *Williams v. Conroe Indep. School Dist.*, 809 S.W.2d 954, 957 (Tex. App.—Beaumont 1991, no writ)(transcript of hearing and deposition excerpts that were unverified were not proper summary judgment evidence).

300. 810 S.W.2d 772.

301. TEX. R. CIV. P. 166a.

302. See TEX. R. CIV. P. 166a(d) (providing for the use of unfiled discovery materials in summary judgment practice by filing and service of appendices or notice).

303. 810 S.W.2d at 774.

304. *Bixenstine v. Palacios*, 805 S.W.2d 889, 891 (Tex. App.—Corpus Christi 1991, no writ).

305. 798 S.W.2d 274 (Tex. 1990).

306. *Id.* at 278.

307. *Id.*

308. *Id.* at 280-82 (Gonzalez, J., dissenting).

309. *Id.* at 284.

310. 805 S.W.2d 541 (Tex. App.—Dallas 1991, no writ).

311. *Id.* at 552.

clear on this point, the defendant may have included a waiver question in the requested charge he filed with the district clerk before the court's charge was prepared.³¹² Regardless, the court held that issues proposed for inclusion in the charge must be tendered to the trial court after the draft charge is prepared and given to the parties; the mere filing of a set of requested questions, definitions, and instructions prior to the charge conference is insufficient to preserve error.³¹³

Finally, the decisions in *Diamond Shamrock Refining and Marketing Co. v. Mendez*³¹⁴ and *Methodist Hospitals of Dallas v. Corporate Communicators, Inc.*³¹⁵ stand for the proposition that a trial court errs in allowing objections to be made to the charge after it is read to the jury, even if the parties consent to such a procedure.³¹⁶ Significantly, the court in the latter case noted that the trial judge, rather than correcting the perceived error in the charge upon objection made during closing arguments, could have properly utilized rule 272³¹⁷ by allowing the jury to retire and then, on his own motion, modifying the charge, reading it to the jury, and allowing additional argument.³¹⁸

XIII. JURY PRACTICE

In a decision that surprised many observers, the United States Supreme Court held that *Batson v. Kentucky*,³¹⁹ which prohibits the prosecution in a criminal case from exercising its peremptory challenges to exclude prospective jurors solely on account of their race,³²⁰ also applies to civil litigation.³²¹ The Court reversed a decision of the Fifth Circuit court of appeals,³²² which had held that a civil lawsuit does not involve state action.³²³ The Supreme Court disagreed, stating that "[t]he selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race."³²⁴ Moreover, the Court concluded that, due to the significance of the civil courtroom in society, a private litigant has a sufficient interest in challenging the discriminatory exclusion of a juror on that person's behalf.³²⁵

The Texas courts have already begun addressing the issues raised by *Edmonson*. In *Powers v. Palacios*³²⁶ the Texas supreme court remanded the case for a new trial where counsel for the defendant admitted that race "fig-

312. *Id.*

313. *Id.*

314. 809 S.W.2d 514 (Tex. App.—San Antonio 1991, writ granted).

315. 806 S.W.2d 879 (Tex. App.—Dallas 1991, writ denied).

316. *Diamond Shamrock*, 809 S.W.2d at 522-23; *Methodist Hosps.*, 806 S.W.2d at 885.

317. TEX. R. CIV. P. 272.

318. 806 S.W.2d at 885.

319. 476 U.S. 79 (1986).

320. *Id.* at 89.

321. *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077, 2088 (1991).

322. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990)(en banc).

323. *Id.* at 221-22.

324. 111 S.Ct. at 2086.

325. *Id.* at 2087-88.

326. 813 S.W.2d 489 (Tex. 1991).

ured into" his exercise of a peremptory strike against the only black member of the jury panel in a personal injury suit brought by a black plaintiff.³²⁷ Although the court provided no express guidance on the appropriate burden of proof, it found that counsel's remarks were sufficient to establish invidious discrimination,³²⁸ notwithstanding counsel's further statement that the juror's race was not the sole reason for her being struck. In *Pierson v. Noon*³²⁹ the court followed criminal precedents in holding that a party must lodge his objection regarding the discriminatory use of peremptory strikes before the jury is sworn and the remainder of the venire discharged.³³⁰

The timeliness of a jury demand was at issue in *Halsell v. Dehoyos*.³³¹ The supreme court held that a request for a jury trial that is untimely under rule 216³³² becomes timely if the case is reset for trial more than thirty days from the date the request was filed.³³³ Moreover, the court went on to hold that a trial court's error in denying a timely request for a jury trial is harmless only if the record shows that there were no material issues of fact and an instructed verdict would have been appropriate.³³⁴

*Thomas v. City of O'Donnell*³³⁵ involved the question of when a party must object to a trial court seating a jury of less than twelve. Pursuant to rule 235,³³⁶ a trial court is required to draw or summon additional jurors if the use of peremptory challenges leaves the jury incomplete.³³⁷ The *Thomas* court held that the plaintiff did not waive his objection to an incomplete jury by waiting until the peremptory challenges were actually exercised, rather than objecting when the possibility of an insufficient number of jurors first arose (*i.e.*, when the venire was reduced to fewer than twenty-four).³³⁸ Perhaps more significantly, the court stated in dicta that rule 235³³⁹ does not require anything of the parties when the jury is left incomplete due to peremptory challenges, but instead places the onus on the trial judge to direct that additional jurors be drawn or summoned.³⁴⁰ It is unclear if the court meant to imply by this latter statement that the plaintiff could have raised his objection even later in the proceedings.

327. *Id.* at 490-91 and n.1.

328. *Id.* at 491.

329. 814 S.W.2d 506 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

330. *Id.* at 508.

331. 810 S.W.2d 371 (Tex. 1991)(per curiam).

332. TEX. R. CIV. P. 216 (jury demand must be filed not less than thirty days before date set for trial).

333. 810 S.W.2d at 371. The court specifically disapproved the opinion in *Brawner v. Arelano*, 757 S.W.2d 526 (Tex. App.—San Antonio), *pet. dism'd by agr.*, 758 S.W.2d 756 (Tex. 1988), to the extent it is inconsistent with the holding in *Halsell*. 810 S.W.2d at 372 n.1.

334. 810 S.W.2d at 372.

335. 811 S.W.2d 757 (Tex. App.—Amarillo 1991, no writ).

336. TEX. R. CIV. P. 235.

337. *Id.*

338. 811 S.W.2d at 759.

339. TEX. R. CIV. P. 235.

340. 811 S.W.2d at 759.

XIV. JUDGMENT, DISMISSAL, AND MOTIONS FOR NEW TRIAL

In *Landmark American Insurance Co. v. Pulse Ambulance Services, Inc.*³⁴¹ the Texas supreme court held that, where a trial court orders a remittitur pursuant to a timely-filed "motion for new trial, or in the alternative, for remittitur," the time for appeal runs from the date of such order rather than the date of the original judgment.³⁴² The court distinguished a Texas Commission of Appeals' decision³⁴³, which held that a voluntary remittitur was not a modification of the prior judgment,³⁴⁴ on the basis that the defendant's motion in effect asked the trial court to correct an error in the judgment.³⁴⁵

*Cecil v. Smith*³⁴⁶ involved the procedure for preserving appellate complaints of no evidence and factual insufficiency of the evidence. The supreme court held that a timely-filed motion for new trial raising these issues, regardless of whether it is overruled by written order or by operation of law, is all that is required to preserve error for appellate review.³⁴⁷ The supreme court rejected the court of appeals' reading of Texas Rule of Appellate Procedure 52(a)³⁴⁸ as requiring the movant to call her motion for new trial to the trial court's attention, concluding that the more specific provisions of the appellate and district court rules governing preservation of error in motions for new trial³⁴⁹ controlled over the general rule for preserving error.³⁵⁰

Several cases decided during the Survey period addressed the procedure for the dismissal of cases for want of prosecution and their subsequent reinstatement. In *General Electric Co. v. Falcon Ridge Apartments, Joint Venture*³⁵¹ the supreme court observed that the district clerk is not required to note on the docket sheet either the mailing of the notice of intent to dismiss an action for want of prosecution or the notice of the signing of an order of dismissal.³⁵² Thus, the absence of affirmative proof that notice was sent does not establish error on the face of the record, and an appeal from the dismissal by writ of error is not appropriate.³⁵³ The court noted, however, that the dismissal could be attacked by bill of review.³⁵⁴ The supreme court also held, in *Thordson v. City of Houston*,³⁵⁵ that the language of rule 165a³⁵⁶

341. 813 S.W.2d 492 (Tex. 1991)(per curiam).

342. *Id.* at 499.

343. *See* Pope v. Wedgeworth, 221 S.W. 950 (Tex. Comm'n App. 1920, holding approved).

344. *Id.* at 951.

345. 813 S.W.2d at 498-99.

346. 804 S.W.2d 509 (Tex. 1991).

347. *Id.* at 511-12.

348. TEX. R. APP. P. 52(a).

349. TEX. R. APP. P. 52(d); TEX. R. CIV. P. 324.

350. 804 S.W.2d at 511-12.

351. 811 S.W.2d 942 (Tex. 1991).

352. *Id.* at 943.

353. *Id.* at 943-44. Compare with *Langdale v. Villamil*, 813 S.W.2d 187, 190-91 (Tex. App.—Houston [14th Dist.] 1991, no writ) (allowing appeal by writ of error where record reflected notice of trial setting to defendant's disbarred attorney).

354. 811 S.W.2d at 944 n.2.

355. 815 S.W.2d 550 (Tex. 1991)(per curiam).

356. TEX. R. CIV. P. 165a.

requires that an oral hearing be held on any timely motion to reinstate.³⁵⁷ And in *Charles L. Hardtke, Inc. v. Katz*³⁵⁸ the court held that a written docket entry, which was specific and initialed by the trial judge, was sufficient as an order of reinstatement.³⁵⁹

Default judgment procedure was at issue in several cases during the Survey period. In *Long v. McDermott*³⁶⁰ a divided court of appeals held that, after the citation and petition have been served on the defendant, the plaintiff is not obliged to provide a separate notice of the hearing on damages if the defendant fails to answer.³⁶¹ Conversely, in a post-answer default situation, *Langdale v. Villamil*³⁶² held that notice to the defendant of the trial setting must affirmatively appear in the record.³⁶³ According to the *Langdale* court, the contrary holding in *Prihoda v. Marek*³⁶⁴ poses too great a threat of "mischief" to the constitutional guarantee of notice and an opportunity to be heard.³⁶⁵

Finally, in a case that should be of interest to any trial practitioner who has ever tried to enforce a money judgment, the supreme court held in *Briones v. Solomon*³⁶⁶ that post-judgment interest is "interest" within the meaning of the Texas usury statutes.³⁶⁷ Thus, the court held that the statutory penalties can apply to a demand for payment of usurious post-judgment interest.³⁶⁸

XV. APPELLATE PROCEDURE

A. Perfecting the Appeal

Several cases decided during the Survey period concerned the effect of a party's technical mistake in attempting to perfect an appeal. Two of the cases involved the filing of a notice of appeal under the wrong cause number. Although these cases presented nearly identical facts, and both were decided by the same court, the result in each case was different.

In *Evans v. Evans*³⁶⁹ the appellant filed a cost bond seeking to appeal a

357. 815 S.W.2d at 550.

358. 813 S.W.2d 548 (Tex. App.—Houston [1st Dist.] 1991, no writ).

359. *Id.* at 550. Compare with *Zavaletta v. Cellular Engineering, Ltd.*, 805 S.W.2d 915, 916 (Tex. App.—Corpus Christi 1991, no writ) (oral pronouncement and docket entry will not substitute for written order for purposes of granting motion for new trial).

360. 813 S.W.2d 622 (Tex. App.—Houston [1st Dist.] 1991, no writ).

361. *Id.* at 624. In the dissent's view, the failure to provide such notice was in violation of due process. *Id.* at 625.

362. 813 S.W.2d at 187.

363. *Id.* at 191.

364. 797 S.W.2d 170 (Tex. App.—Corpus Christi 1990, writ denied).

365. 813 S.W.2d at 191.

366. 35 Tex. Sup. Ct. J. 92 (November 6, 1991).

367. *Id.* at 94.

368. *Id.* The judgment creditor's problem in *Briones* arose when its attorney sent a second demand letter to one of three judgment debtors, after a portion of the judgment had been paid by the other two. Although the renewed demand correctly reflected the reduced principal amount of the judgment, it failed to adjust the per diem amount demanded as post-judgment interest.

369. 809 S.W.2d 573 (Tex. App.—San Antonio 1991, no writ).

severed cause within the thirty-day time limit specified in rule 41(a)(1).³⁷⁰ Appellant's bond, however, contained the original cause number rather than the cause number of the severed case. Therefore, the appellee requested the court to dismiss the appeal on the ground that the cost bond did not perfect the appeal because it was filed in the wrong case. The court refused appellee's request because there was no confusion concerning which judgment the appellant was seeking to appeal, and instead allowed the appellant to file an amended bond.³⁷¹ In doing so, the court made two observations. First, rule 46³⁷² does not require that a cost bond contain the trial court's cause number.³⁷³ Second, a defective bond does not defeat the jurisdiction of the court of appeals.³⁷⁴ The court went on to distinguish *Philbrook v. Berry*³⁷⁵ in which the supreme court held that a motion for new trial filed in the wrong cause did not extend the trial court's plenary power over a default judgment.³⁷⁶ According to the court, *Philbrook* was not controlling as it addressed only motions for new trial and not cost bonds on appeal.³⁷⁷

Only three months earlier, however, in *City of San Antonio v. Rodriguez*³⁷⁸ the same court of appeals expressly relied on *Philbrook* in dismissing an appeal under circumstances nearly identical to those in *Evans*. The appellant in *Rodriguez* had also filed his notice of appeal³⁷⁹ under the wrong cause number. Simultaneously, the appellant filed a motion to modify judgment, again with the wrong cause number. Based on the holding in *Philbrook*, the court of appeals held that neither the motion to modify nor the notice of appeal was timely filed inasmuch as both instruments were filed in the wrong case.³⁸⁰ Although the *Rodriguez* opinion contains a lengthy discussion of *Philbrook* and other similar cases involving misfiled motions for new trial,³⁸¹ the court made no effort, as it did three months later in *Evans*, to distinguish these cases from a situation involving a misfiled notice of appeal.

Although the circumstances were slightly different in *Grand Prairie Independent School District v. Southern Parts Imports, Inc.*³⁸² the supreme

370. TEX. R. APP. 41(a)(1) (a party perfecting an appeal is required to file his cost bond or other security within thirty days after the judgment is signed unless any party has timely filed a motion for new trial or a request for findings of fact and conclusions of law in a case tried without a jury).

371. 809 S.W.2d at 574; see TEX. R. APP. P. 46(f) (court of appeals may permit a party to amend his cost bond to cure a defect in substance or form).

372. TEX. R. APP. P. 46.

373. 809 S.W.2d at 574.

374. *Id.* (citing *Davis v. Jeffries*, 764 S.W.2d 559, 560 (Tex. 1989)(per curiam)).

375. 683 S.W.2d 378 (Tex. 1985).

376. *Id.* at 379.

377. 809 S.W.2d at 574.

378. 810 S.W.2d 405 (Tex. App.—San Antonio 1991, no writ).

379. As a municipality, the appellant in *Rodriguez* was not required to file security for costs on appeal; a timely-filed written notice of appeal was sufficient to perfect its appeal. See TEX. R. APP. P. 40(a)(2).

380. 810 S.W.2d at 407.

381. See, e.g., *Richie v. Ranchlander Nat'l Bank*, 724 S.W.2d 851 (Tex. App.—Austin 1986, no writ); *Southland Paint v. Thousand Oaks Racquet Club*, 687 S.W.2d 455 (Tex. App.—San Antonio 1985, no writ).

382. 813 S.W.2d 499 (Tex. 1991)(per curiam).

court's decision in that case should eliminate the confusion engendered by the conflicting rulings in *Evans* and *Rodriguez*. One of the appellants in *Grand Prairie*, a school district, filed a notice of appeal rather than an appeal bond. The court of appeals, after concluding that the suit did not involve the collection of delinquent taxes,³⁸³ held that the school district was required to post an appeal bond to perfect its appeal.³⁸⁴ The court, therefore, dismissed the appeal for want of jurisdiction due to the school district's failure to post the required bond.³⁸⁵ The supreme court reversed that decision because the school district's timely filing of the notice of appeal constituted "a bona fide attempt to invoke appellate court jurisdiction."³⁸⁶ Engaging in an analysis virtually identical to that contained in the *Evans* opinion, the court held that rules 46³⁸⁷ and 83³⁸⁸ reflect a policy of liberally permitting appellants to amend appeal bonds.³⁸⁹ On the authority of these rules, the court held that appellate courts may not dismiss an appeal when the appellant files the wrong instrument to perfect that appeal without first allowing the appellant to amend or refile the instrument to cure the defect.³⁹⁰

B. The Record on Appeal

Rule 53³⁹¹ permits an appellant to request only a partial statement of facts so long as he includes in his request a statement of the points he relies upon for appeal.³⁹² If an appellant chooses this route, he is limited to the points he has specified; but he is also entitled to a presumption that nothing omitted from the partial statement of facts is relevant to those points.³⁹³ The supreme court stated in *Schafer v. Conner*,³⁹⁴ however, that an appellant who complains of the legal or factual sufficiency of evidence may not take advantage of the procedure set forth in rule 53.³⁹⁵ An appellant in those

383. As a general rule, school districts are required to post appeal bonds in order to perfect an appeal. See *Wilson v. Thompson*, 162 Tex. 390, 391-94, 348 S.W.2d 17, 18-19 (1961) (per curiam). School districts are exempt from the bond requirement, however, if they are appealing from a suit to collect delinquent taxes. See TEX. TAX CODE ANN. § 33.49(a) (Vernon 1982); *Brady Indep. School Dist. v. Davenport*, 663 S.W.2d 637, 638-39 (Tex. App.—Austin 1983, no writ).

384. *Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc.*, 803 S.W.2d 762, 764 (Tex. App.—Dallas), *aff'd in part, rev'd in part*, 813 S.W.2d 499 (Tex. 1991)(per curiam).

385. *Id.*

386. 813 S.W.2d at 500 (quoting *Walker v. Blue Water Garden Apts.*, 776 S.W.2d 578, 581 (Tex. 1989)).

387. TEX. R. APP. P. 46(f) (see *supra* text accompanying note 352).

388. TEX. R. APP. P. 83 (courts of appeal should allow reasonable time to correct or amend form or substance defects in appeal procedures).

389. 813 S.W.2d at 500.

390. *Id.* In adopting this holding, the court expressly disapproved the cases of *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671 (Tex. App.—El Paso 1987, writ denied); *Plano Indep. School Dist. v. Oake*, 682 S.W.2d 359 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985); and *Marshall v. Brown*, 635 S.W.2d 578 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.). *Id.* at 500 n.4.

391. TEX. R. APP. P. 53(d).

392. *Id.*

393. *Id.*

394. 813 S.W.2d 154 (Tex. 1991) (per curiam).

395. *Id.* at 155.

circumstances can discharge his burden of showing error in the judgment only if he brings forward a complete or an agreed statement of facts.³⁹⁶

*Wilkins v. Reisman*³⁹⁷ also involved an incomplete statement of facts on appeal. The court reporter was to blame in *Wilkins*, however, because she lost one-half of her trial notes and could not prepare a full statement of facts. In these circumstances, a reversal is generally automatic.³⁹⁸ The appellee argued, however, that the appellant could not take advantage of the record's inadequacy in this case because she had never challenged the jury's finding of zero damages. Although some courts have adopted a rule that any error in a verdict on liability issues is harmless where a zero damage finding goes unchallenged,³⁹⁹ the court refused to apply this rule in *Wilkins*. The court noted that application of the "rule" cited by appellee had been limited to cases in which the losing plaintiff's points on appeal challenged only the liability issues.⁴⁰⁰

The appellant in *Wilkins*, however, challenged the fairness of the entire trial in addition to the liability issues. Specifically, the appellant asserted error in the trial court's handling of voir dire and its exclusion of evidence, "both of which could potentially contaminate the entire case, including the jury's damage findings."⁴⁰¹ Because the partial statement of facts prepared by the reporter did not contain the transcription of the voir dire examination and other portions of the trial pertinent to the claimed error, the court of appeals was unable to fairly review appellant's complaint.⁴⁰² Therefore, the court reversed the judgment and remanded the case for a new trial.⁴⁰³

Finally, the court in *Fleming v. Taylor*⁴⁰⁴ held that an appellant cannot complain of the trial court's failure to file findings of fact and conclusions of law if he does not file the required notice with the clerk within the thirty-day time period specified in rule 297.⁴⁰⁵ Although the appellant missed this

396. *Id.*; accord *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968). In *Shafer* the supreme court expressly disapproved the court of appeals' alternative holding that Tex. R. App. P. 53(d) required an appellant's statement of points to be filed in the same instrument as appellant's request for a partial statement of facts. 813 S.W.2d at 155. Characterizing this holding as "hypertechnical," the supreme court implied that the statement of points need only be filed with the request for a partial statement of facts. *Id.*

397. 803 S.W.2d 822 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

398. *Id.* at 823 (citing *Wolters v. Wright*, 623 S.W.2d 301, 305 (Tex. 1981)).

399. See, e.g., *Easley v. Castle Manor Nursing*, 731 S.W.2d 743, 744 (Tex. App.—Dallas 1987, no writ); *Wooley v. West*, 575 S.W.2d 659, 660 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

400. 803 S.W.2d at 823.

401. *Id.*

402. *Id.* at 825. In a concurring opinion, one justice noted that Texas courts had previously found that proper challenges to alleged error in voir dire and exclusions of admissible evidence were sufficient to preserve the points for appeal without any additional requirement that the appellant allege error in the jury findings. *Id.* at 826 (Sears, J. concurring) (citing *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705 (Tex. 1989); and *Grain v. Hill County*, 613 S.W.2d 367 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.)). According to the concurrence, the error was not in the jury's failure to find, but rather in the court's failure to give the jury the opportunity to find. 803 S.W.2d at 826 (Sears, J. concurring).

403. 803 S.W.2d at 826.

404. 814 S.W.2d 89 (Tex. App.—Corpus Christi 1991, no writ).

405. *Id.* at 91; See TEX. R. CIV. P. 297 (if the court has not responded timely to the

deadline by only two days, the court held that he had waived the alleged error.⁴⁰⁶

C. Requirements of Briefs

Rule 131⁴⁰⁷ limits the length of an application for writ of error to fifty pages.⁴⁰⁸ If an application fails to comply with this rule, the supreme court may order that it be redrawn.⁴⁰⁹ Two cases decided during the Survey period emphasize that this briefing requirement should not be taken lightly. In *Buffalo v. Robbins*⁴¹⁰ for example, the supreme court ordered petitioners to redraw their applications and overruled their request for an enlargement of the page limitation. Although the petitioners subsequently filed redrawn applications, they again apparently ignored the fifty page limitation. Consequently, the court dismissed the application.⁴¹¹ A similar fate befell the petitioner's application in *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*.⁴¹² The petitioner in *White Budd* technically complied with the fifty-page maximum, but only by reducing print and margin sizes to a point where the application was difficult to read. The court, therefore, struck the application and criticized petitioner's maneuver as a violation of the spirit, if not the letter, of rule 131(i).⁴¹³

The court displayed greater leniency in *Weaver v. Southwest National Bank*.⁴¹⁴ The appellant in *Weaver*, following a briefing practice that is fairly routine, set forth the factual statements in his brief in a single section that was separate from his arguments and authorities relating to each point. The court of appeals, deeming this practice a violation of the briefing requirements of rule 74,⁴¹⁵ decided that appellant's brief was inadequate and refused to consider all but one of appellant's points of error.⁴¹⁶ The supreme court disagreed, noting that the only "inadequacy" of appellant's brief was its failure to restate the facts and record references under each point of error.⁴¹⁷ Pointing to another section of rule 74,⁴¹⁸ the court stated that briefing rules are to be construed liberally and that substantial compliance with the rules is sufficient.⁴¹⁹ Because the "Fact Statement" section of appellant's brief included all facts relied upon for the appeal, a majority of the court

original request, counsel must file a "Notice of Past Due Findings of Fact and Conclusions of Law" with the clerk).

406. 814 S.W.2d at 91.

407. TEX. R. APP. P. 131(i).

408. *Id.* 131(i).

409. *Id.* 131(j).

410. 811 S.W.2d 541 (Tex. 1991).

411. *Id.* at 541-42.

412. 811 S.W.2d 541 (Tex. 1991).

413. *Id.* at 541.

414. 813 S.W.2d 481 (Tex. 1991)(per curiam).

415. TEX. R. APP. P. 74(f) (requiring that appellant's argument include a fair, condensed statement of the facts pertinent to each point together with a discussion of the facts and authorities relied upon to maintain the point).

416. 813 S.W.2d at 481.

417. *Id.* at 482.

418. TEX. R. APP. P. 74(p).

419. 813 S.W.2d at 482.

concluded that appellant had substantially complied with the briefing requirements of the rule.⁴²⁰

D. Miscellaneous

Rule 60⁴²¹ permits a court to dismiss a party's appeal for failure to comply with any order of the court.⁴²² Based on this rule, the court of appeals in *O'Connor v. Sam Houston Medical Hospital, Inc.*⁴²³ dismissed appellant's appeal due to the failure to comply with the trial court's orders compelling post-judgment discovery.⁴²⁴ The supreme court reversed that judgment and held that rule 60(a) does not authorize dismissal of an appeal for failure to comply with a trial court's order.⁴²⁵ According to the court, the phrase "order of the court" in rule 60(a) refers only to orders of the court of appeals.⁴²⁶ The court hastened to add, however, that it was not deciding whether a court of appeals may ever properly dismiss an appeal due to an appellant's failure to comply with a trial court order.⁴²⁷ Under appropriate circumstances, therefore, authority for such a dismissal presumably exists elsewhere in the rules or case law.

Under *City of Houston v. Clear Creek Basin Authority*⁴²⁸ and its progeny,⁴²⁹ a summary judgment can neither be reversed nor affirmed on any ground that is not specifically presented in the motion for summary judgment.⁴³⁰ In what the Austin court of appeals considered to be a logical extension of this rule, *Carlisle v. Phillip Morris, Inc.*⁴³¹ held that the ground specified in a summary judgment is the only one on which the judgment can be affirmed.⁴³² At least one other case⁴³³ stands for the contrary proposition, however, and the supreme court will hopefully resolve the conflict when it considers *Carlisle* next term.

XVI. RES JUDICATA

In *Eagle Properties, Ltd. v. Scharbauer*⁴³⁴ the supreme court considered

420. *Id.*

421. TEX. R. APP. P. 60.

422. *Id.* 60(a)

423. 802 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1990), *rev'd*, 807 S.W.2d 574 (Tex. 1991).

424. *Id.* at 251.

425. 807 S.W.2d at 576. In reaching this conclusion, the court pointed out that no other court had ever held that Tex. R. App. P. 60(a) or its predecessor, TEX. R. CIV. P. 387, authorized dismissal of an appeal because of the violation of a trial court's order. *Id.*

426. *Id.*

427. *Id.*

428. 589 S.W.2d 671 (Tex. 1979).

429. See, e.g., *Dhillon v. General Accident Ins. Co.*, 789 S.W.2d 293, 295 (Tex. App.—Houston [14th Dist.] 1990, no writ); *Houston Lighting & Power Co. v. Wheelabrator Coal Servs., Co.*, 788 S.W.2d 933, 936 (Tex. App.—Houston [14th Dist.] 1990, no writ).

430. 589 S.W.2d at 675-77.

431. 805 S.W.2d 498 (Tex. App.—Austin, Feb. 6, 1991, writ requested).

432. *Id.* at 501.

433. See *Veytia v. Seiter*, 740 S.W.2d 64 (Tex. App.—San Antonio 1987), *aff'd*, 756 S.W.2d 303 (Tex. 1988).

434. 807 S.W.2d 714 (Tex. 1990).

whether the doctrines of *res judicata* or collateral estoppel precluded a state action that was filed after the settlement of a federal case involving different parties but the same subject matter. The case arose out of a sale-leaseback transaction for the First National Bank Building in Midland, Texas. Less than a year before its collapse, the First National Bank sold its building to plaintiff, a partnership composed of wealthy Midland residents that were hand-picked by the bank's president. The partnership financed part of the purchase price by executing promissory notes in favor of the bank. Simultaneously with the sale, the bank entered into a long term lease for the building that was intended to generate income to the partnership sufficient for the repayment of the notes. When the bank was declared insolvent less than a year after the transaction, the FDIC, as receiver, brought suit in federal court to collect on the promissory notes. The partnership filed a counterclaim in the federal suit, alleging that the bank had fraudulently induced it to enter into the sale-leaseback transaction. Following a non-jury trial, the district court held that the bank had not fraudulently induced the partnership to enter into the transaction or execute the promissory notes.⁴³⁵ Although the partnership appealed this adverse judgment, the parties entered into a settlement agreement while the case was on appeal. The settlement agreement explicitly preserved the partnership's right to file future claims against the bank's former officers and directors, but it did not provide for a vacating of the trial court's judgment in favor of the FDIC. Subsequent to the settlement agreement, the partnership and its partners filed suit in state court against the bank's former officers and directors alleging fraud, negligence, breach of fiduciary duties, and violations of the Texas Deceptive Trade Practices Act (DTPA).⁴³⁶ The defendants in the state court suit obtained summary judgment as to the entire case on the basis that all of plaintiffs' claims had been or could have been determined in the federal suit and, therefore, they were barred by *res judicata* and collateral estoppel. Although the court of appeals affirmed the summary judgment⁴³⁷, the supreme court reversed the judgment in part, holding that the doctrine of *res judicata* did not apply under the circumstances of the case and that several of plaintiffs' claims were not barred by collateral estoppel.⁴³⁸

The supreme court began its analysis by reviewing the federal law of *res judicata*.⁴³⁹ As a general rule, the court noted, state claims that could have been brought in a prior federal court action may not be asserted in a subsequent state court suit.⁴⁴⁰ A subsequent action based on the state claims would not be precluded, however, if the federal court did not possess juris-

435. *FDIC v. Eagle Properties, Ltd.*, 664 F. Supp. 1027 (W.D. Tex. 1985).

436. TEX. BUS. & COM. CODE § 17.001 *et. seq.* (Vernon 1988).

437. 758 S.W.2d 911 (Tex. App.—El Paso 1988), *rev'd in part, aff'd in part*, 807 S.W.2d 714 (Tex. 1990).

438. 807 S.W.2d at 725.

439. Since the first suit was decided in federal court, the supreme court concluded that federal law controlled the determination of whether *res judicata* would bar a later state court proceeding. *Id.* at 718 (citing *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); and *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985)).

440. 807 S.W.2d at 718.

diction over the omitted state claims or clearly would have declined to exercise its jurisdiction as a matter of discretion.⁴⁴¹ The initial question presented by the case, therefore, was whether the federal court would have exercised ancillary or pendent party jurisdiction⁴⁴² over the plaintiffs' state court claims against the bank's officers and directors if the partnership had asserted those claims in the federal lawsuit.⁴⁴³ The court answered this question in the negative based on the United States Supreme Court's decision in *Finley v. United States*.⁴⁴⁴ According to the court, *Finley* does not permit a trial court to exercise pendent-party jurisdiction unless the text of a jurisdiction statute explicitly grants, or manifests an intent to grant, jurisdiction over additional parties.⁴⁴⁵ Jurisdiction in the federal suit was predicated on the statute conferring jurisdiction over civil suits involving the FDIC.⁴⁴⁶ Since that statute explicitly grants jurisdiction only over claims to which the FDIC is a party,⁴⁴⁷ the *Eagle Properties* court found that the federal district court would not have had jurisdiction over the state law claims subsequently filed by the plaintiffs against the bank's officers and directors.⁴⁴⁸ Accordingly, res judicata did not preclude plaintiffs from asserting those claims in the state court suit.⁴⁴⁹

Next, the court addressed the issue of collateral estoppel.⁴⁵⁰ Pivotal to the court's determination was whether the federal court's finding that the bank had not defrauded plaintiff was merely an alternative holding in support of the FDIC's judgment.⁴⁵¹ Based on a review of the federal court's opinion,

441. *Id.* (citing *Jeanes*, 688 S.W.2d at 104).

442. "Ancillary jurisdiction generally involves claims asserted defensively . . . or by a party 'whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.'" 807 S.W.2d at 719 n.3 (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1987)). Pendent-party jurisdiction is an amalgamation of ancillary and pendent-claim jurisdiction, and involves jurisdiction over parties not named in claims before the federal court and over whom there is no independent basis of federal jurisdiction. *Id.* As noted by the *Eagle Properties* court, the federal courts have so far failed to definitively distinguish between ancillary jurisdiction and pendent-party jurisdiction. *Id.* In 1990, Congress codified "ancillary" and "pendant" jurisdiction under the caption of "supplementary jurisdiction" at 28 U.S.C. § 1367. Under subsection (b) of this statute, there is no substantive change from prior case law on the subject of supplemental jurisdiction. However, subsection (a) provides supplemental jurisdiction to federal district courts over related claims forming a part of the same case or controversy as the underlying action, including claims involving joinder or intervention of additional parties. 28 U.S.C. § 1367 (1990). See also *C.D.S. Diversified, Inc. v. Franchise Fin. Corp. of America*, 757 F.Supp. 202 (E.D.N.Y. 1991); *Krenzfeld A.G. v. Carnehammar*, 138 F.R.D. 594 (S.D. Fla. 1991); *Port Allen Marine Servs., Inc. v. Chotin*, 765 F.Supp. 887 (M.D. La. 1991).

443. 807 S.W.2d at 718-19. The court identified this question only after first determining that there would have been no independent basis of federal jurisdiction over the claims plaintiffs later asserted against the bank's officers and directors in the state court suit. *Id.*

444. 490 U.S. 545 (1989).

445. 807 S.W.2d at 719.

446. 12 U.S.C. § 1819 (1988) (providing that federal courts will have jurisdiction over all suits of a civil nature in which the FDIC is a party, as those suits shall be deemed to arise under the laws of the United States).

447. See *F.D.I.C. v. Israel*, 739 F. Supp. 1411, 1413-14 (C.D. Cal. 1990).

448. 807 S.W.2d at 721.

449. *Id.*

450. *Id.* at 721-25.

451. Plaintiffs contended that the federal court's finding of an absence of fraud on the part

the Texas supreme court concluded that the federal district court's findings regarding fraud did not constitute an alternative holding because the court had "rigorously considered" plaintiff's claims of fraudulent inducement."⁴⁵² Under Texas law, therefore, collateral estoppel barred relitigation of the plaintiffs' fraud claims in state court because they had already been "actually" litigated in the federal suit and were "essential" to the prior judgment.⁴⁵³ The court reached a different result with respect to several of plaintiffs' DTPA claims. Specifically, the court held that the DTPA claims that involved actual intent as an element of the claim⁴⁵⁴ could not be relitigated because the issue of intent was barred by collateral estoppel due to the federal court's ruling with respect to fraud.⁴⁵⁵ The court held, however, that plaintiffs were free to pursue their other DTPA claims because they did not depend on a finding of intent and involved alleged misrepresentations that were not actually decided in the federal suit.⁴⁵⁶

In *Mower v. Boyer*⁴⁵⁷ the supreme court faced a choice between two inconsistent judgments rendered by separate courts. The appeal arose from a summary judgment entered in favor of a creditor on his promissory note suit in district court. After the creditor initially had obtained a partial summary judgment in that suit, the debtor died. The creditor, therefore, commenced a second suit on the note in probate court while the district court suit was still pending. When the debtor prevailed in this second suit, the creditor returned to the district court seeking a final judgment and did not appeal the decision of the probate court. In the district court proceeding, the debtor affirmatively pled the probate court's judgment as res judicata and collateral estoppel. The district judge refused to give the probate court's judgment any preclusive effect, however, since that judgment conflicted with matters the district court had previously decided by partial summary judgment.⁴⁵⁸ Instead, the district court determined anew the issues unresolved by the partial summary judgment and ultimately entered a final judgment in favor of the creditor.⁴⁵⁹ The court of appeals affirmed this judgment on the basis that the suit in probate court had been barred by res judicata and collateral estoppel because the district court entered the partial summary judgment before

of the bank was merely an alternative to the court's finding that the FDIC had a valid defense to the claim based on its lack of knowledge of the alleged fraud. See *FDIC v. Eagle Properties, Ltd.*, 664 F. Supp. 1027, 1037, 1045-46 (W.D. Tx. 1985). If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone. (*Restatement (Second) of Judgments* § 27, comment (i) (1982)).

452. 807 S.W.2d at 722 (quoting the federal trial court from 664 F.Supp. at 1037).

453. 807 S.W.2d at 722. See *Tarter v. Metropolitan Sav. & Loan Ass'n*, 744 S.W.2d 926, 927 (Tex. 1988). The court also observed that the same result would apply under the federal law of collateral estoppel. 807 S.W.2d at 722 (citing *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168-70 (5th Cir. 1981). Therefore, the court did not decide the choice of law issue. 807 S.W.2d at 721.

454. See, e.g., TEX. BUS. & COM. CODE § 17.46(b)(23) (Vernon 1986).

455. 807 S.W.2d at 724.

456. *Id.*

457. 811 S.W.2d 560 (Tex. 1991).

458. *Id.* at 562.

459. *Id.*

the probate court ruled.⁴⁶⁰

The supreme court reversed the court of appeals' judgment, agreeing with the debtor that the decision in the later-filed probate suit barred the creditor's continued litigation in the district court.⁴⁶¹ The court stated that the partial summary judgment entered by the district court was not entitled to either *res judicata* or collateral estoppel effect in the probate suit because the district court's partial summary judgment was only interlocutory; it could not support the creditor's plea of *res judicata*.⁴⁶² Likewise, the interlocutory summary judgment failed to satisfy any of the three criteria⁴⁶³ established for collateral estoppel purposes.⁴⁶⁴ The judgment entered by the probate court, on the other hand, was entitled to preclusive effect in district court under the collateral estoppel doctrine.⁴⁶⁵ The court held that the relevant issues had been fairly litigated in the probate suit involving the creditor, and these issues were clearly essential to the probate court's judgment.⁴⁶⁶ Having decided the case on the narrower ground of collateral estoppel, the court saw no need to address whether the probate court's judgment was entitled to *res judicata* effect.⁴⁶⁷

XVII. MISCELLANEOUS

A. Notice of Trial Setting

Before its amendment, rule 245⁴⁶⁸ authorized courts to set contested cases for trial on the motion of any party, with reasonable notice of not less than ten days to the parties.⁴⁶⁹ The plaintiff in *Langdale v. Villamil*⁴⁷⁰ attempted to comply with this rule by serving notice of the trial setting on defendant's counsel. Defendant's counsel had been disbarred, however, almost a year before the notice was delivered. Since this disbarment terminated the attorney-client relationship,⁴⁷¹ the court concluded that plaintiff's notice to the

460. *Mower v. Boyer*, 795 S.W.2d 292, 293 (Tex. App.—Houston [14th Dist.], *rev'd*, 811 S.W.2d 560 (Tex. 1991).

461. 811 S.W.2d at 562.

462. *Id.*

463. According to the court, a prior adjudication of an issue will be given collateral estoppel effect only if it meets all three factors considered in determining whether the issue was adequately deliberated and firm. *Id.* These factors are: (1) whether the parties were fully heard, (2) whether the court supported its decision with a reasoned opinion, and (3) whether the decision was subject to appeal or was in fact reviewed on appeal. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

464. 811 S.W.2d at 562.

465. *Id.* at 563.

466. *Id.* These facts satisfied the three requirements for invocation of the collateral estoppel doctrine that have been articulated by the supreme court in its prior decisions. *See, e.g., Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

467. 811 S.W.2d at 563 n.3.

468. TEX. R. CIV. P. 245 (1976), amended April 24, 1990 and effective September 1, 1990.

469. *Id.* The amended rule requires forty-five days advance notice to the parties of a first setting for trial. *See* TEX. R. CIV. P. 245.

470. 813 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1991, no writ).

471. *See Royden v. Ardoin*, 160 Tex. 338, 331 S.W.2d 206, 209 (1960).

attorney could not be imputed to the defendant.⁴⁷² Because defendant did not otherwise receive notice of the trial setting, the court held that the entry of a default judgment against the defendant due to his nonappearance at trial constituted a denial of due process.⁴⁷³ The court disregarded the judgment's recital that due notice of the trial was given to the defendant.⁴⁷⁴ According to the court, it need not indulge the usual presumptions of validity in support of a judgment in the case of a direct attack on a default judgment.⁴⁷⁵

B. Filing of Pleadings

Texas Rule of Civil Procedure 5⁴⁷⁶ provides that a filing by mail will be deemed timely if it is deposited in the United States mail on or before the last day for filing and received by the clerk not more than ten days after the filing deadline.⁴⁷⁷ Practitioners who wait until the last moment to file their instruments should take note of the decision in *Carpenter v. Town and Country Bank*.⁴⁷⁸ In *Carpenter*, the defendants sent their motion for new trial to the clerk on the thirtieth day after the judgment was entered.⁴⁷⁹ Evidencing a questionable lack of confidence in the postal service, the defendants elected to send their motion by UPS. Defendants subsequently filed an appeal bond, apparently believing that the motion for new trial had extended to ninety days the period in which they could perfect an appeal of the trial court's judgment.⁴⁸⁰ The court of appeals held that defendants did not timely perfect their appeal because the cost bond was not filed within thirty days of the judgment.⁴⁸¹ Defendant's motion for new trial failed to extend the appellate period because it too was untimely.⁴⁸² Accordingly, defendants could not rely on rule 5 to enlarge the filing period for their motion for new trial because they sent the motion by a private courier rather than using the U.S. mail as required by the rule.⁴⁸³

C. Sanctions

In *Koslow's v. Mackie*⁴⁸⁴ the supreme court upheld a trial court's entry of a default judgment as a sanction for defendant's failure to participate in the

472. 813 S.W.2d at 190 (citing *Beck v. Arondino*, 20 Tex. 330, 50 S.W. 207, 209 (1899, no writ) (notice acquired by attorney after termination of attorney-client relationship is not imputed to former client)).

473. 813 S.W.2d at 190.

474. *Id.* at 189.

475. *Id.*

476. TEX. R. CIV. P. 5.

477. *Id.* The appellate rules contain an identical provision for filings made with the appellate courts. See TEX. R. APP. P. 4(b).

478. 806 S.W.2d 959 (Tex. App.—Eastland 1991, writ denied).

479. A motion for new trial is due to be filed on or before thirty days after the judgment is signed. TEX. R. CIV. P. 329b.

480. In order to perfect an appeal, a party must file its appeal bond within thirty days after the judgment is signed, or within ninety days after that date if any party has timely filed a motion for new trial. TEX. R. APP. P. 41(a)(1).

481. 806 S.W.2d at 960.

482. *Id.*

483. *Id.*

484. 796 S.W.2d 700 (Tex. 1990).

preparation of a joint status report.⁴⁸⁵ The trial court in *Koslow's* sent a letter to the parties requesting them to confer about various pretrial matters and to provide the court with a status report. The letter also advised the parties that failure to comply with the request could result in a show cause hearing in which the court would consider imposing sanctions on the recalcitrant party. After the defendants, who were appearing in the case pro se, failed to confer with their opponents or to appear at the subsequently scheduled show cause hearing, the trial court entered a default judgment in favor of the plaintiff.⁴⁸⁶ Although the court of appeals refused to condone defendant's conduct, it nevertheless reversed the default judgment, holding that the trial court was not empowered to sanction the defendants for a failure to confer with their opponent.⁴⁸⁷ According to the court of appeals, rule 166⁴⁸⁸ permits a judge to order the parties to appear for a conference, but it does not authorize an order that the parties confer with each other outside the court.⁴⁸⁹

The supreme court reversed, ruling that the court of appeals erred in so narrowly confining the meaning of "an appearance" under rule 166.⁴⁹⁰ Rule 166, said the court, must be read in conjunction with rule 7 of the Rules of Judicial Administration,⁴⁹¹ which provides for the use of telephone or mail in lieu of personal appearances for various matters, including pretrial conferences.⁴⁹² Thus, the trial court's power to require an appearance under rule 166 includes the express power to order an appearance by written report filed by mail.⁴⁹³ The court also observed that the pretrial conference rule would be meaningless if the trial court did not have the power to require the action described in the rule.⁴⁹⁴ The court concluded, therefore, that the trial judge had implicit power under rule 166 to provide in his pretrial order that noncompliance would result in a "disposition hearing, at which time cause will have to be shown why dismissal, default, or other sanctions should not be imposed."⁴⁹⁵

D. Attorney's Fees

In *Gill Savings Association v. Chair King, Inc.*⁴⁹⁶ the supreme court upheld a trial court's award of appellate attorney's fees in a non-jury case even though the prevailing party's attorney failed to testify about those fees at

485. *Id.* at 705.

486. *Id.* at 702.

487. *Mackie v. Koslow's*, 774 S.W.2d 741, 743 (Tex. App.—El Paso 1989), *rev'd sub nom. Koslow's v. Mackie*, 796 S.W.2d 700 (Tex. 1990).

488. TEX. R. CIV. P. 166 (allowing a trial court at its discretion to order the parties to appear for a pretrial conference to aid in the disposition of the case).

489. 774 S.W.2d at 742. °

490. 796 S.W.2d at 703.

491. TEX. R. JUDICIAL ADMIN. 7a(6)(b).

492. 796 S.W.2d at 703.

493. *Id.*

494. *Id.*

495. *Id.*

496. 797 S.W.2d 31 (Tex. 1990).

trial.⁴⁹⁷ During the trial, plaintiff's attorney gave testimony as to the amount and reasonableness of his client's fees incurred through trial, but he neglected to offer any evidence about the fees his client would reasonably and necessarily incur on appeal. The court in a non-jury trial may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence.⁴⁹⁸ The supreme court, therefore, held that the trial court's own proceedings together with the trial judge's ability to take judicial notice of usual and customary fees on appeal constituted some evidence to support the attorney fee award.⁴⁹⁹ The court also permitted plaintiff to recover attorney's fees he had incurred in a related bankruptcy proceeding, expressly disapproving the court of appeal's earlier holding that those fees were nonrecoverable in a breach of contract action as a matter of law.⁵⁰⁰

497. *Id.* at 32.

498. TEX. CIV. PRAC. & REM. CODE § 38.004 (Vernon 1986). The statute provides that it shall be liberally construed to promote its underlying purposes. *Id.* § 38.005.

499. 797 S.W.2d at 32.

500. *Id.*

